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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

~~82 MISC.~~

No. 411

YVETTE J. MADSEN,

Petitioner,

v.

NINA KINSELLA, Warden of the U. S. Reformatory for Women,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Fourth Circuit, dated April 2, 1951, which affirmed the order of the United States District Court for the Southern District of West Virginia discharging the writ of habeas corpus and remanding her to the custody of the Respondent.

Opinions Below

The opinion of the Court of Appeals is reported in 188 F. 2d 272. The opinion of the District Court (R. 78-93) is reported in 93 F. Supp. 319.

Jurisdictional Statement

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(I). The judgment of the Circuit Court of Appeals was entered April 2, 1951. The time within which to file this petition was extended to July 29, 1951, by order of Chief Justice Vinson dated June 29, 1951.

Statement of Facts and Matters Involved

Petitioner, Yvette J. Madsen, is a native-born American citizen and the mother of two infant children. She was the wife of a United States army officer, Lieutenant Andrew E. Madsen, now deceased. She and her husband entered the American Zone of Occupied Germany in November, 1947, as a part of the military forces of the United States.

That she was accompanying the armies of the United States and was therefore a person subject to military law within the purview of Article of War 2 is admitted by the pleadings (Verified Petition, par. 1, R. 4; which allegation was not denied in the Return, R. 17). The Agreed Statement of Facts (R. 27, 28) states, among other things, that she enjoyed all the privileges and immunities of persons in the armed forces of the United States and that *"she enjoyed all the immunities from German jurisdiction granted persons in the Armed Forces of the United States"*.

On October 20, 1949, Petitioner was arrested by the Air Force Military Police and charged before a so-called *United States Military Government Court* with the murder of her husband in violation of *Paragraph 211 of the German Criminal Code* (R. 4, 28, 34-35).

Prior thereto and on September 21, 1949, military government and the military occupation of Germany, as such, had terminated (R. 41-65)[1] and the German Federal Republic, with full legislative, executive and judicial pow-

[1] On April 8, 1949, the Department of State announced:

"The Occupation Statute will define the powers to be retained by the occupation authorities upon the establishment of the German Federal Republic and set forth basic procedures for the operation of Allied supervision. Subject only to the limitations of the Statute, *the German Federal State and the participating Laender will have full legislative, executive and judicial powers*, in accordance with the Basic Law and with their respective constitutions. The Statute aims to permit the German people to exercise democratic self-government. * * *

"With the establishment of the German Federal Republic there will be a marked change in the organization to carry out occupation responsibilities. *Military Government as such will be terminated and the functions of the Allied authorities will become mainly supervisory.* Each of the Allied establishments in Germany will come under the direction of a High Commissioner, aside from the occupation forces which will remain headed by Military Commanders." (Petitioner's Exhibit 2, R. 53-54)

On May 18, 1949, the Department of State announced:

"As United States High Commissioner, Mr. McCloy will be the supreme United States authority in Germany. Subject to consultation with and ultimate direction by the President, he will be under the immediate supervision and direction of the Secretary of State. He will have the authority to exercise all the governmental functions of the United States in Germany, other than the Command of the United States Occupation Forces." (Petitioner's Exhibit 3, R. 56)

In the Agreed Statement of Facts, it was stipulated:

*"United States Military Government in Germany was carried on under the Department of the Army until 21 September 1949. * * * On that date also the Office of Military Government for Germany (the agency which had been administering military government) ceased to function except for certain liquidating operations* and the Office of the United States High Commissioner for Germany became the United States agency in the American Zone of Occupied Germany through which the authority vested in the U. S. High Commissioner was exercised." (Italics supplied.) (R. 32.)

ers, except as limited by the Occupation Statute, came into being (R. 53-54). An Allied High Commission was established with authority to exercise only limited supervisory functions over the activities of the German Federal Republic (see testimony given before the subcommittee of the Committee on Appropriations for 1951. House of Representatives, Eighty-first Congress, Second Session, pp. 463-4; 478). Hon. John J. McCloy was designated United States High Commissioner pursuant to the provisions of the Foreign Service Act of 1946 and has functioned in that capacity under the immediate supervision of the Secretary of State (Executive Order 10062, R. 58).

Executive Order 10062, dated June 6, 1949, recognized the difference between the military functions of the U. S. Army in Germany and the political role of the State Department in that country. It directed that "with respect to military matters the Commander of the United States Armed Forces in Germany shall continue to receive instructions directly from the Joint Chiefs of Staff" (R. 59). Mr. McCloy was not vested with any powers or functions with respect to military matters or army personnel, nor were any powers vested in him to appoint military tribunals such as is sometimes vested in military officers pursuant to express mandate of Congress (Articles of War 8, 15 and notes thereunder; Manual for Courts-Martial, 1949, par. 2).

On February 20, 1950, Petitioner, although charged by "United States Military Government" before a United States Military Government Court (R. 34), was brought to trial before a tribunal which called itself *"the United States Court of the Allied High Commission for Germany, 4th Judicial District"* (R. 39). Its asserted jurisdiction was that it was a continuation of the earlier U. S. Military Government courts except that its judges were appointed by the State Department instead of by the military authorities as was done formerly. As a reason for not bringing her to trial before courts-martial as directed by

Congress (Articles of War 92 and 93),[2] it was asserted that General Clay had, on December 11, 1948, authorized trial of all dependent wives before Military Government courts for *"any non-military offense"* (R. 13) and that murder was a non-military offense. Congress, however, expressly decreed that it was a military offense by adding it to the enumerated military offenses in the Act of 1874, Article of War 58, now 92, 93.

The tribunal which tried her was composed of three civilians who were referred to as District Judges. Its membership was not selected by any competent military command or even by Mr. McCloy, but by the "Chief Presiding District Judge" (a civilian) acting upon "authority" which he stated was vested in him (R. 66-67). The source of that "authority" was not made known, and counsel has been unable to learn from whence it stems. Congress has decreed power of selection and appointment to be in certain military officers and the President has decreed that that power was non-delegable (Manual for Courts-Martial, 1949, par. 5a, pp. 4-5).

The procedure which the tribunal followed was *not* that authorized by the Articles of War or the United States

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[2] ART. 92. Murder—Rape.—Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided*, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

ART. 93. Various Crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct: *Provided*, That any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article.

Criminal Code, but a set of self-made rules first adopted on August 18, 1948, when military government was in force (Mil. Govt. Ordinances 31, 32, 33). Other rules of similar character were employed prior to August 1948 (Mil. Govt. Ordinance 2).

The applicable substantive law applied in these tribunals, involved an offense under German law or an offense in violation of occupation directives. Such laws were intended for the German people only (JAGJ 1946/7691, 10 Dec. 1946, par. 9). Nevertheless, in this case a violation of the German Criminal Code was charged (R. 29, 34).[3]

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[3] The Theatre Judge Advocate for the U. S. Forces in Europe, in sustaining General McNarney's view that these courts should *not* be used for the trial of "American citizens, particularly those who are subject to military law within the purview of Article of War 2, said:

"* * * In military government courts, instead of stress being placed upon the rights of the accused, it is based upon the purpose of protecting the United States forces in occupation. * * * German law would define criminal offenses; and it is believed that, in order to secure competent representation in the interpretation of such laws in military government courts, an accused would engage the services of a German lawyer. In this connection it should be borne in mind that the right of effective representation by counsel has been held to be an integral part of the due process of law guaranteed by the Fifth Amendment. Such an antipathetic circumstance as representation by an enemy attorney, coupled with a failure to provide American citizens with the customary constitutional guarantees and procedural safeguards afforded in American courts (and in the main preserved in court-martial procedure), would have a disastrous impact. Under the present conditions in Germany it is believed that trial of dependents by court-martial would be fairer, more practical, and more acceptable to the American public to whom every public servant is held accountable. 'It is not only important that justice be done; it is equally important that the public believe that justice is being done' (Chief Justice Taft. * * *"

Continuing, the Theatre Judge Advocate said:

"The case history of Article of War 2(d) discloses sufficient evidence and adaptability to support a ruling that dependents are persons accompanying the Army in the field, thus rendering them subject to military law and amenable to trial by

The Petitioner, after her trial before this heretofore unheard of type of tribunal, was found guilty and sentenced to a term of fifteen years. To exhaust all remedies, and in order to lay the foundation for habeas corpus proceedings, she appealed to the U. S. Court of Appeals for the Allied High Commission. That tribunal, like the trial court, was composed of civilians appointed by the State Department. This same tribunal, when functioning under military auspices prior to the establishment of the Allied High Commission, in a case almost identical to the one here involved, wrote an opinion confirming its own juris-

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court-martial. Due consideration of all aspects of the problems of fairness and equality of justice, effective internal administration of the Army, security, morale, and discipline within the military community, would seem to require that dependents be governed much the same as those with whom they are commorant. It is believed that their trial by court-martial would be justified as a matter of law under the provisions of Article of War 2(d) as well as Article of War 12, and that they should be tried by courts-martial when the nature of the offense is such as to require trial rather than administrative disposition, and there is no other forum in which the safeguards and customs expected by Americans is provided." (JAGJ 1946/7691)

The above quotations are taken from a communication from General McNarney's Theatre Judge Advocate to the Judge Advocate General in Washington, asking reconsideration of the Judge Advocate General's Opinion of October 10, 1946 wherein the view was expressed that dependents, although amenable to trial before courts-martial, should not be so tried. General McNarney's own views in favor of courts-martial and against subjecting dependents to trial before other tribunals are set forth, in part, in a footnote in the Brief in support of this Petition. General McNarney indicated very strongly his opposition to the trial of American dependents before courts which lack Constitutional guarantees and safeguards. General Green, the Judge Advocate General, replied to General McNarney on 25 February 1947, saying that the earlier recommendations of his office were "advisory only." He then said, "At the same time, I wish to suggest caution as to such trials (court-martial trials of dependents)." His reasons for suggesting "caution"—which are not legal reasons—are then set forth. (JAGJ, 1946/7691, 26 February 1947.) Whether those words of caution served to prevent trial of this Petitioner and other defendants before courts-martial, is not known. Counsel can only surmise that it brought about the desired result.

diction and that of the trial court. That opinion, entitled *United States Military Government* v. *Wilma Baker Ybarbo,* appears in I Court of Appeals Reports 207 U. S. Mil. Govt. Courts for Germany. The rationale of that opinion and the one written by the United States District Court in this case are entirely different. One or the other must be wrong on the basis of their mutually conflicting reasoning. Petitioner contends both are wrong. The United States Court of Appeals, without regard to the conflict, cited both opinions with approval, even though they are inconsistent with several important decisions of this Honorable Court (see Brief attached).

Petitioner is presently confined at the Federal Reformatory for Women in Alderson, West Virginia, pursuant to the decree of the United States Court of Appeals for the Allied High Commission for Germany. That Court modified the lower Court's order respecting confinement "under a directive of the Secretary of State" (R. 37).

The question of the guilt or innocence of the Petitioner is not here in issue.[4] There is here in issue, however, the question of whether the organized system of military justice as prescribed by the Articles of War shall be controlling, or whether the Executive Branch of Government, acting through the State Department, the War Department, or any other agency or body, may substitute another system more to its liking.[5]

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[4] In *Ex parte Quirin,* 317 U. S. 1, 25, and again in *In re Yamashita,* 327 U. S. 1, this Court said:

> "We are not here concerned with any question of the guilt or innocence of petitioners. Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. Ex parte Milligan, supra, 119, 132; Tumey v. Ohio, 273 U. S. 510, 535; Hill v. Texas, 316 U. S. 400, 406."

[5] Mr. Justice Jackson, in his speech before the Conference of Bar Association Presidents on September 16, 1950, expressed apprehen-

Reasons Relied Upon for Allowance of Writ and Questions Presented

This trial is unprecedented in our history. Never before have we brought an American citizen to trial before a civilian tribunal created by a State Department official, for an alleged violation of foreign law, and tried such person pursuant to self-ordained rules and without regard to Constitutional and statutory safeguards, as provided in the United States Code of Criminal Procedure for federal criminal cases or the Articles of War in military cases.

The District Court in its opinion said, that the issues here raised *"probe deeply into fundamental principles concerning limitations on executive and judicial power, and involve also the interpretation of important Constitutional and statutory provisions."* (R. 82)

So dangerous is the precedent established by the opinions of the Courts below, and so vast are its implications, that counsel fear it may well be a dragon's tooth sown in this era of expanding military power which could spring forth irrepressibly to further encroach upon rights heretofore held inviolate.

The decisions of the Courts below mean that the military, the State Department, or other administrative branch of the Executive, may bring to trial and punish any Ameri-

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sion concerning Constitutional rights during wartime. He said: "* * * a total war drags us inevitably in the direction of totalitarianism; and the longer the war lasts, the further we are drawn toward it. * * * We must all recognize that the war power is the Achilles heel of our Constitution. It is the most vague, the most expandable, the least definable, and once granted, it is the most difficult to recall." Mr. Justice Jackson urged lawyers not to let vigilante justice supplant organized justice. He insisted that organized justice, no matter how defective, is more considerate, more fair, and more responsible. Unquestionably the Articles of War, our organized code of military justice established by Congress, no matter how defective, is more considerate, more fair, and more responsible a body of rules than the impromptu system adopted and applied in this case.

can citizen who is subject to Article of War 2, even to the extent of inflicting death, without regard to Congressional enactments and in utter disregard thereof or in contravention thereof. It is claimed that Article of War 15 gave such power, in that it granted concurrent jurisdiction to "military commissions" or other "military tribunals" coextensive with that of courts-martial, and that such commissions or other military tribunals need not conform to the Articles of War or the Manual for Courts Martial in their application of either the substantive law or procedure. Even the personnel of our fallen enemy were not so exposed. (*In re Yamashita*, 327 U. S. 1.)

The decisions of the Courts below mean that the hundreds of thousands of Americans, soldiers[6] and civilians alike, serving or accompanying the Armed Forces in a war or occupation zone may be denied all rights under the Articles of War (both substantive and procedural) and be

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[6] The District Judge asked counsel for the Respondent, at the time of argument, if Lt. Madsen could have been tried before the so-called High Commission Court if the situations were reversed and Lt. Madsen had killed his wife, instead of his wife having killed him. The answer, if counsel recalls correctly, was an unequivocal "yes." Logically speaking, the answer could not have been otherwise. Both are "persons subject to military law" within the purview of Article of War 2. Both were triable before courts-martial for the offense of murder (Article of War 92). If, as Respondent contends, Article of War 15 granted to a military commission and other tribunals jurisdiction concurrent with that of courts-martial over offenses specifically made punishable by the Articles of War, then Lt. Madsen could have been tried by either tribunal and the will of the commanding officer directing trial before a military commission or other tribunal could thus supersede the will of Congress as expressed in the Articles of War. We would then have the strange spectacle of an American soldier being tried before a civilian court for a violation of foreign law. If the power was in the commanding officer or in a State Department official to make the choice of tribunals for Mrs. Madsen, as was held by the Courts below, then he had like power to act in a case involving Lt. Madsen. In addition, review on appeal would not be before a Military Review Board, as directed by Congress, but before a group of the commanding officer's choosing, assuming he decided to grant review at all. Subordinate State Department officials here assert that like power was vested in them. Obviously the road is paved with danger.

punished as willed by the military commander or some lesser official. As can readily be seen, these legal principles vitally affect the lives, liberty, and property of many Americans in all parts of the world and are of great importance far beyond the particular facts or the party in this case.

Determination of the rights of the Petitioner herein will also determine the rights of those thousands of other American citizens, soldiers and officers as well as other persons serving or accompanying the Armed Forces of the United States outside the territorial limits of the United States. All these Americans are entitled to know whether they are subject to trial and punishment pursuant to the laws of the United States as enacted in the Articles of War, or pursuant to such rules as the Military or State Department officials may, at their whim, decide to declare applicable.

Far more than the fate of Petitioner and far more than appears upon the surface in this litigation is in issue. The strides made by the military over the lives and liberty of persons within its control since the outbreak of World War II have been enormous. The State Department presently asserts the right to act with equal power. If the State Department has that power, why could not the Interior or Commerce Departments also exercise such power? The Courts below held that the creation of the tribunal in question stemmed from the President's war powers and that "it was for the President, as commander in chief, to use such governmental department or agency as he thought proper in governing the conquered territory * * * " (Opinion, Parker, C. J., p. 274). The District Court said substantially the same thing (R. 87). The door is now ajar—and only this Honorable Court is in a position to prevent continued subjugation of American citizens to the unfettered will of the military or other departments of the Executive Branch of our Government.

Some strange and novel doctrines concerning the rights of American citizens and the power of the Executive

Branch of the Government to exercise judicial, and legislative functions have been advanced by the Courts below which, unless reviewed and limited in scope, would tend to undermine the basic concepts of Constitutional government. (See Brief attached.) [7]

The decisions of the Courts below are in direct conflict with several important decisions of this honorable Court. *Coleman* v. *Tennessee*, 97 U. S. 509; *Dow* v. *Johnson*, 100 U. S. 158; *In re Yamashita*, 327 U. S. 1; *Ex parte Quirin*, 317 U. S. 1; *The Exchange* v. *McFadden*, 11 U. S. 116; and a number of Circuit Court Opinions which bear on various aspects of this case, *Perlstein* v. *U. S.*, 151 F. 2d 167 (3rd Circuit); *Ex parte Gerlach*, 247 F. 616 (2nd Circuit); *Hines* v. *Mikell*, 259 F. 28 (4th Circuit); *Ex parte Jochen*, 257 F. 200 (5th Circuit); *Mobley* v. *Handy*, 176 F. 2d 491 (5th Circuit), and many eminent writers on the subject, as well as a series of decisions by the Judge Advocate General, all of which are referred to in the Brief in support of this Petition.

In addition, the decisions below mean that the oft-repeated adage that the Constitution and laws of the United States follow the flag, is to be placed in discard and that the *will* of the commanding general of an area, or the President of the United States acting through subordinates, may be substituted therefor. Respondents argued, with apparent success in the Courts below, that *"the appellant* [Petitioner herein] *has no rights under the Constitution or any statute which apply to her trial by an occupation court* [Millitary Commission] *in Germany."* (Brief of Appellee, p. 43: Italics added).

Individuals, even those not connected with the Armed Forces, are entitled, as this Honorable Court said in *Duncan* v. *Kahanamoku*, 327 U. S. 304, at p. 307:

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[7] President Washington, in his farewell address to the nation on 17 September 1796, warned: "The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism. * * * let there be no change by usurpation. * * * it is the customary weapon by which free governments are destroyed" (The Writings of George Washington, G. P. O., Dec. 1940, pp. 228, 229).

"* * * to have their guilt or innocence determined in courts of law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of these safeguards. Since these judicial safeguards are prized privileges of our system of government we granted certiorari."

In the *Duncan* case, the conviction was reversed with these potent statements by the Court:

"People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule * * *" (p. 319).

"Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they value. *Ex parte Quirin*, 317 U. S. 1, 19. * * * We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. See *Ex parte Milligan*, 4 Wall. 2; *Chambers* v. *Florida*, 309 U. S. 227. Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government.

"Military tribunals have no such standing. For as this Court has said before: '* * * *the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary.* * *'" (pp. 322, 323). (Italics supplied.)

Preliminary Argument in Support of the Petition

It is a fundamental principle of our law that an American citizen may not be tried or imprisoned by the sovereign power of the United States except in accordance with the Constitution and laws of the United States and no decree, whether issued in the name of the President, his subordinate officers, or the military establishment, can direct otherwise. (*Ex parte Milligan*, 71 U. S. 2; *Duncan* v. *Kahanamoku*, 327 U. S. 304; *Ex parte White*, 66 F. Supp. 982; *Ex parte Quirin*, 317 U. S. 1, 19; *Ex parte Duncan*,

66 F. Supp. 976). Even our enemies must be offered "due process of law" when, *through judicial process*, punishment is sought to be imposed by American authorities. (*In re Yamashita*, 327 U. S. 1; *Ex parte Quirin*, 317 U. S. 1; *Hirota* v. *MacArthur*, 338 U. S. 197.

This case is not one which involves trial and punishment by a foreign power. Unquestionably an American may be punished by a foreign power in accordance with its laws for offenses committed within its jurisdiction in cases where they have custody of the accused. Insofar as this Government is concerned, however, the trial of any person, whether before a civilian or military tribunal, must be in accordance with our law and not in accordance with what the Executive Branch of the Government chooses to decree as law, either substantive or procedural. *Kurtz* v. *Moffitt*, 115 U. S. 487, 500; *McClaughry* v. *Deming*, 186 U. S. 49, 69; *Hamilton* v. *McClaughry*, 136 F. 445; *Ex parte Milligan*, 71 U. S. 2; *Ex parte White*, 66 F. Supp. 982; *Jecker* v. *Montgomery*, 54 U. S. 498, 515; *U. S.* v. *Symonds*, 120 U. S. 46; *Sterling* v. *Constantin*, 287 U. S. 378; *Duncan* v. *Kahanamoku*, 327 U. S. 304; *In re Yamashita*, 327 U. S. 1, 9; *O'Reilly de Camara* v. *Brooke*, 209 U. S. 45; *Dynes* v. *Hoover*, 61 U. S. 65, 78; *Mitchell* v. *Harmony*, 54 U. S. 115; *Ex parte Quirin*, 317 U. S. 1.[8]

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[8] In the *Milligan* case, at pp. 119-121, Mr. Justice Davis, writing for the Court, said:

> "The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law, human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. *If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings.* * * *
>
> *The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield*

Unless it can be shown that the Petitioner was tried and is presently imprisoned pursuant to some provision of the laws of the United States—a burden which is on Respondent [9]—it becomes the duty of this Court to declare the entire proceedings a nullity and to sustain the writ of habeas corpus.

Prayer for the Writ

For the reasons hereinabove stated, and those stated in the Brief in support of this Petition, it is respectfully prayed that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant case so that the cause may be reviewed and determined by this Honorable Court and the judgment of the lower Court reversed; and Peti-

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of its protection all classes of men, at all times, and under all circumstances."

In the *Quirin* case, at p. 25, this Court said, "Congress and the President, like the courts, possess no power not derived from the Constitution."

[9] There are no presumptions in favor of the jurisdiction exercised by a military court. To give effect to its judgment it must be made to clearly and affirmatively appear that it was legally constituted, that it had jurisdiction over the person and the offense and that its proceedings including its judgment conform to law (*Dynes* v. *Hoover*, 61 U. S. 65; *Runkle* v. *U. S.*, 122 U. S. 543; *Hamilton* v. *McClaughry*, 136 F. 445). The burden of establishing compliance with the law is on Respondent, for as was said in the *Hamilton* case, *supra*, 447, 48: "'So jealous are all English-speaking nations of the liberties of their subjects, where a respondent in habeas corpus admits the restraint charged against him, he must justify by basing his right of restraint upon the exercise of some provision of positive law binding upon him, or the writ must issue and the person restrained have his liberty."

tioner respectfully prays that she be granted such other, further and equitable relief as this Court may deem just and proper.

JOSEPH S. ROBINSON
JAMES D. GRAHAM, JR.
DAYTON M. HARRINGTON
JOHN C. MORRISON,

Counsel for Petitioner

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

The petitioner is a person serving and accompanying the armies of the United States without the territorial limits of the United States and is therefore a "person subject to military law" within the purview of Article of War 2.

The Articles of War in effect at the time this Petitioner was brought to trial state in the preamble, that said Articles "shall at all times and in all places govern the Armies of the United States." Article of War 2 places in the category of persons who are subject to the Articles of War, all soldiers, whether officers or enlisted men, cadets, certain classifications of officers of the Marine Corps, and *"All retainers to the camp and all persons accompanying or serving with the armies of the United States, without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."*

There is no distinction between soldiers and civilian persons accompanying the Army, in so far as their amenability to the Articles of War is concerned. They are all classified as "persons subject to military law."

If the State Department, as was done in this instance, or a military commander has the power to declare the Articles of War inapplicable to any civilian person or persons falling within the purview of Article of War 2, then like power exists to declare the Articles of War inapplicable to soldiers and officers. All are in the same category

and the distinction sought to be drawn by the Courts bel
is without legal justification.[10]

Sustaining the conviction here means, in substance, t
the State Department or the Military Establishment h
the power to decree that American soldiers or any oth

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[10] The lower Courts failed to distinguish *Coleman* v. *Tennes*
97 U. S. 509, and *Dow* v. *Johnson*, 100 U. S. 158, which cases h
unequivocably that the personnel of our army are not subject
the laws of the area or country they occupy and that courts-mar
have *exclusive* jurisdiction over them. The District Court, H
Ben Moore, disregarded these cases entirely and made no ment
of them. Mr. Justice Clark, who wrote the opinion in the *Yba*
case (hereinabove referred to), while recognizing the significa
and applicability of those cases, held that those decisions of t
Honorable Court were merely *dicta* and not to be followed (
Point II of this Brief). Judge Parker, writing for the Court
Appeals, 4th Circuit, reasoned differently. He said that those
ings, the *Coleman* and *Dow* cases, applied *only* to "members
the Armed Forces" (presumably the Court meant men in unifor
and therefore were not applicable here. Congress drew no st
distinction in its enactment of the Articles of War. Congress cla
fied as persons subject to military law not only "members of
Armed Forces", but other persons as well, such as retainers
camp, persons serving with the army, persons accompanying
army, etc. They all fall within a group. They were all classif
as "persons subject to military law". To now subdivide that gr
and apply different rules to each subdivision is not warranted
anything Congress said or did, or by any judicial interpretation
the language Congress employed.

Article of War 92 directs that *"any person subject to military*
found guilty of murder" shall be punished *"as a court-martial m*
direct" and so forth. This statute is mandatory as to all persons
that classification and is not limited in its scope to "members of
Armed Forces" as the lower Court ruled.

It is difficult to believe, but Mr. Justice Clark, in the *Ybarbo* c
p. 224, said: "We have seen that for tactical reasons *the armies*
the field carry their own criminal law with them and that putting
in operation lies within the discretion of the military authoritie
No authority was cited for this strange doctrine that the Articles
War may be suspended, even for soldiers and officers, at the will
the military authorities. Congress, in the Preamble to the Artic
of War, said that those Articles *"shall govern,"* not *may gove*
The Court of Appeals for the Fourth Circuit agreed that *"sh*
govern" meant exactly what it says, but ruled that the Articles
plied to only a portion of the persons enumerated as being "subj
to military law" and not to all of them.

person subject to military law stationed in Germany, Austria, Italy, Japan, Korea, or elsewhere, may be tried before any self-created tribunal, for a violation of local law. Such power never existed and cannot be spelled out of the provisions of Article of War 15 or the so-called common law of war. (See cases cited under Point II.)

The reference in Article of War 2 to persons "accompanying" the Armies of the United States is not new in the current Articles which were enacted in 1920. Similar provision was contained in the 1916 enactment. Such provision, however, was not in effect in 1895 when Col. William Winthrop revised his work on Military Law which was substantially completed in 1880. Nevertheless, even under the old law, a dependent wife of a soldier or officer, as well as his family and servants, were deemed to be subject to military law and triable by courts-martial. (Winthrop's *Military Law and Precedents*, 2nd Ed., 1920 Rep., pp. 98-99). Ives, Hough, and other eminent writers on military law held likewise (Simmons, on *Courts Martial*, pp. 33, 34; *Hough, Precedents in Military Law*, p. 629; Ives, *A Treatise on Military Law*, pp. 59-61).[11]

Many cases, recently decided, hold that American civilians in a war area, even though not retained by or serving with the Armed Forces, are amenable to military law and therefore triable by courts-martial. (*Perlstein* v. *U. S.*, 151 F. 2d, 167, cert. denied 327 U. S. 777; *Ex parte Gerlach*, 247 F. 616; *Grewe* v. *France*, 75 F. Supp. 433; *In re Berue*, 54 F. Supp. 252; *McCune* v. *Kilpatrick*, 53 F. Supp. 80; *Ex parte Falls*, 251 F. 415; *Hines* v. *Mikell*, 259 F. 28, cert. denied 250 U. S. 645; *Hammond* v. *Squire*, 51 F. Supp. 227; *Mobley* v. *Handy*, 176 F. 2d. 491; *In re Di Bartolo*, 50 F.

[11] In footnote 94, on p. 99, Col. Winthrop wrote:

"Members of the families of soldiers or officers, commorant with the army, would be amenable as camp-followers. Simmons, Par. 71, note, cites the case of Hannah Fitchet, a soldier's wife, convicted of manslaughter by a general court-martial in India in 1825. That the *wife of an officer* may be triable by court-martial as a camp-follower, see Hough, (P.) 629."

Supp. 929; *Ex parte Duncan*, 66 F. Supp. 976; *Ex parte Jochen*, 257 F. 200).

The Agreed Statement of Facts (R. 27-28) indicates how integral a part of our Army, Petitioner was considered, and the extent of her activities as such.[12] If anything more is needed to classify her as a person "accompanying" the Army of the United States, than that set forth in footnote 12, it is difficult to understand what it is. Every privilege and immunity authorized persons in uniform was authorized this Petitioner. True, she was not

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[12] Respondent admits that, "In or about the month of November 1947 the petitioner and her husband entered the American Zone of Occupied Germany. Permission to so enter was granted to her by competent military authority. She was transported across the Atlantic Ocean on a vessel operated under the jurisdiction of the military authorities and without cost to herself. The orders for her transportation were issued by the military authorities and the said orders stated on their face that 'travel herein authorized is necessary in the military service.' An identification or 'AGO' card, identical to that issued to persons in military uniform, was issued to her by the War Department acting through the Adjutant General's Office. Transportation from the port of disembarkation was by train reserved exclusively for United States military personnel and was at Government expense. Petitioner and her husband were granted facilities, accommodations and billets established for the United States military forces. Petitioner's home was requisitioned for military use and was furnished and maintained by competent U. S. military authorities. Petitioner was authorized to and did use the facilities of the United States Army established for persons in the military service of the United States and persons serving with and accompanying the said armed forces, i.e., United States Army commissaries, United States military hospitals, United States Army post exchanges, United States Army Officers' messes, United States Army garage facilities, United States Army rail, automobile, air and water transportation, United States Army recreation centers, United States Army clothing and general merchandising stores, United States Army scrip (a special currency made available only for those authorized to use it, including persons in the military service of the United States). Petitioner was subjected to certain limitations imposed on persons in the military service, such as the prohibition against entering places marked 'off limits' to military personnel, etc. In general she enjoyed all immunities from German jurisdiction granted persons in the armed forces of the United States" (R. 27, 28).

in the employ of the Army, but neither are newspaper correspondents, employees of contractors, officers' servants, entertainers, Red Cross canteen workers, and so forth, all of whom have been held "subject to military law."

In the *Ybarbo* case, *supra*, at p. 213, the Court said: "Although without direct precedent, we are quite ready to concede that the Articles of War apply to the defendant (a dependent wife living with her soldier husband in Germany) and that therefore she is under their protection." The opinion, although agreeing that a dependent wife fell within the provisions of Article of War 2, held by tenuous arguments and a series of unsupported assumptions that said wife (Mrs. Ybarbo in that case) may be tried by a military government court because the commanding general *waived* court-martial jurisdiction over her. Mrs. Ybarbo was sentenced to imprisonment for a term of fifteen years for shooting her soldier husband. No petition for a writ of habeas corpus was filed by her or on her behalf because, for reasons best known to the military, she was set free within a short time after her conviction was affirmed.[18]

Winthrop's view that Article of War 2 should be strictly construed did not prevent his inclusion of families of soldiers and officers accompanying the Army in the category of "retainers to the camp," nor Ives' inclusion of them in the category of "persons serving with" the Armies. Both authors wrote before the 1916 amendment which added

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[18] Continued reference is made to the *Ybarbo* case because it was cited with approval by the Court below and is one of the basic authorities on which the Court below, as well as the Respondent, relied to sustain the conviction in this case. Various parts of that Opinion are discussed throughout this Brief. The situation, however, between the *Ybarbo* case and this case is not wholly analogous, because military government in Germany had ceased to exist at the time this Petitioner was tried (Dept. State Pub. 3556, pp. 88-89, 106). The Government's position is now, therefore, even more untenable.

the word "accompanying." The 1916 amendment makes the construction of Article of War 2 an easier task.[14]

The strict construction theory against enlarging the category of persons amenable to military law is predicated on the Article's creation of an "exceptional jurisdiction over civilians." If military jurisdiction is exceptional as contrasted with civil jurisdiction in the United States, then the Allied High Commission Court's jurisdiction and the Military Government Court's jurisdiction are even more exceptional as contrasted wih courts-martial jurisdiction. The former is almost exclusively by the will of the High Commissioner or military commander, while the latter is a very carefully circumscribed law enacted by Congress (Winthrop, *Military Law and Precedents*, 2nd Ed., pp. 100 and 801; Ives, *A Treatise on Military Law*, p. 60).[15]

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[14] Webster defines the word "accompany" as "to go with or attend as a companion or associate; to attend." (Collegiate Dictionary, 5th Ed.) In *Ex parte Gerlach*, 247 F. 616, 617, it was held that, the provision of Article of War 2, making persons who were "accompanying" the Armies amenable to military jurisdiction, was constitutional. The Court said that this section not only "enables military officers to preserve order on the part of such persons, but also * * * to call on them for assistance and direct their actions while they are properly in the field of military operations. The court-martial, therefore, had exclusive jurisdiction by the terms of the Articles of War. * * *"

[15] If it is the national interest to avoid rendering the citizen amenable to the Articles of War, it is even more in the national interest to protect American Citizens from the laws of a foreign government, particularly one which was recently subjugated by force of arms. Such has been the rule enunciated in *Coleman* v. *Tennessee* and *Dow* v. *Johnson, supra.* It is also in the national interests to protect American citizens in an Occupied Zone from the self-ordained courts of a single individual, even though that individual be an American general, because in him is vested all executive, legislative, and judicial functions. *United States* v. *Diekelman*, 92 U. S. 520; *New Orleans* v. *Steamship Co.*, 87 U. S. 387. It may be prudent that one man exercise such powers over a conquered enemy where the victor must act quickly. Like reasoning does not apply in the case of American citizens, particularly those who have served in or as a part of our military forces. In *Dow* v. *Johnson, supra*, at p. 166, this Court said: "* * * but their continued enforcement (the laws

No functional relationship to the military mission is required to subject a person accompanying the Armies to military law (*VIII Bulletin*, JAG, June 1948, p. 70, also p. 126; *IV Bulletin*, JAG, June 1945, p. 226; *SPJGW* 1944, 8568, *III Bulletin*, JAG, p. 377). If any such relationship was required before the 1916 amendment, when the pertinent paragraph of the Article specified only *"retainers to the camp"* and *"persons serving with the army"*,—Winthrop and Ives either thought that there was no such requirement or that families of military personnel traveling with them satisfied the requirement. It seems obvious that those two categories embraced all persons accompanying the Army in a *functional* relationship, so that the addition of the category "persons accompanying" in 1916 must have been intended to embrace an additional class of persons, viz., those accompanying the Army not in any functional relationship.[16]

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of the occupied area) is not for the protection or control of the army or its officers or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their government and the tribunals by which those laws are administered. * * *"

[16] The fact that a dependent wife may not come into the occupied zone for her own convenience but may come only at the request of the member of the military establishment upon whom she is dependent, and the fact that the U. S. Government permits her to join her husband when he has so requested, indicate Government acknowledgment of the contribution, at least to the morale of the Army, made by wives who travel with their soldier husbands. This contribution to morale, plus whatever service they may render, give dependents as close a functional relationship with the military mission as have others, without whom the Army can function but whose presence with the Army is considered desirable and who have been held to be within the purview of Article 2. Such persons include employees of Post Exchanges (CM 120406-1918, Dig. Op JAG 1912-40, Sec. 359(12); CM 222383 (1942), IV Bull. JAG June 1945, p. 227), USO Camp Shows entertainers (SPJGA 1943/6116, 28 April 1943, IV Bull JAG, June 1945, p. 227), butlers (Winthrop, p. 98, note 87), officer's servants (Idem. p. 98, note 87) etc. Col C. B. Mickelwait, now General Mickelwait, held in JAGJ 1946/7691, 10 Dec. 1946 that dependents do serve in a functional capacity, but whether they do or not, they are still persons subject to military law under Article of War 2(d).

The true test of whether or not a person is "accompanying the Armies" within the meaning of Article of War 2 is whether the person is physically present or resident for a sustained period of time in a place reserved by competent military authority for members of the military establishment, with official acknowledgement by competent authority that such presence or residence is authorized; and the office of the Judge Advocate General so ruled.[17]

It would be a serious blow to the military establishment, who thus far have not appeared in this proceeding, were there to be a holding that a wife, who is in a military zone without the territorial jurisdiction of the United States in time of war, was not accompanying the Armies of the United States. All the authorities point to the conclusion that she does fall within the provisions of the Articles of War. Intimation to the contrary is contained in the opinion of the Court below. It expressed "grave doubt" on the subject. The expression of doubt is insufficient answer to the legal question here raised, because if Petitioner is "a person subject to military law," then like any other person in that classification, she becomes subject to all

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[17] In VII Bull JAG, Sept. 1948, p. 126, the following appears:

"In those cases, however, where a civilian has been held to have been 'accompanying' the armies of the United States, it appeared that he had either moved with a military operation or that his presence within a military installation or theater was not merely incidental but was connected with or dependent upon the activities of the armies or their personnel. He must, in order to come within this class of persons subject to military law, 'accompany' the military service in fact. Although a person accompanying the armies may be 'serving with' them as well, the distinction is an important one, for even though a civilian's contract with the Government may have come to an end before he has committed an offense, so that it may be said he is no longer 'serving with' the armies, jurisdiction may remain on the ground that he is accompanying the armies because of his continued connection with a military community. *Perlstein* v. *U. S.*, 151 Fed. (2nd) 167, IV Bull JAG 462; *In re Di Bartolo*, 50 Fed. Supp. 929, II Bull JAG 338; *Grewe* v. *France*, 75 Fed. Supp. 433, VII Bull JAG 70."

the provisions of the Articles of War and subject to trial by courts-martial *exclusively* for offenses prescribed in said Articles. (See Point II.) On the other hand, if Petitioner does not fall within the provisions of Article of War 2, then, only the question of the legality of the Allied High Commission Court and of its proceedings are open for consideration (*In re Yamashita*, 327 U. S. 1). A concrete ruling as to her status is therefore of primary importance to her and to the thousands of other wives and families who accompany their soldier husbands in far-off lands. Petitioner contends that she falls within the protective mantle of the Articles of War and may not be defranchised of Constitutional and statutory safeguards, as ruled below.

By Article of War 92 Congress has defined the offense and prescribed the punishment for wrongfully killing another. The *Manual for Courts Martial, 1949*, which was promulgated by virtue of authority granted the President by the Congress of the United States in Article of War 38, describes in paragraph 179, the offense of murder and amplifies the provisions of Article of War 92.

A mere reading of paragraph 179 of the *Manual for Courts Martial* will indicate that the character of the offense of murder as understood in military law is different from that described by the German Criminal Code under which the Petitioner was tried. In fact, Section 211 of the German Criminal Code, which it is alleged the Petitioner violated, is so loosely drawn and so difficult to understand, that the British, German and American authorities have had considerable difficulty ascertaining exactly what it does mean. (See U. S. Mil. Govt. Court Reports, opinion No. 70 in case Number 88; No. 19 in case Number 52; and No. 317 in case Number 428.)

Articles of War 4 and 5 prescribe the composition of the courts-martial, authorized to try persons subject to military law. Article of War 8 lists the persons who may appoint courts-martial. Other Articles of War define the offenses and prescribe the procedure. The *Manual for*

Courts Martial, 1949, Chapters 2-28, discusses the jurisdiction of the courts-martial, its creation, procedure, evidence, punishment and review. Chapter 25 of the Manual outlines the procedure to be followed in the event sanity becomes an issue (the mental state of the accused was an issue in this case). Thus we have a situation where Congress has prescribed the classification of persons that may be tried by courts-martial; the character of offenses for which they may be tried; the composition, jurisdiction and procedure of courts-martial, both original and appellate; the substantive law and applicable rules of evidence; the method of review, etc. Nevertheless, despite the existence of these carefully enacted laws, this Petitioner, who fell within its orbit, was tried by other means. She was tried for a violation of a foreign code, by three civilians, who were acting pursuant to rules decreed by themselves or their superiors, and who, it is now claimed, were not required to apply any of the rules prescribed by Congress for the trial of any of the cases before them. This Honorable Court and the District Courts have ruled otherwise.[18]

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[18] The power to define and punish offenses against the sovereignty of the United States is vested exclusively in the Congress, *Koth* v. *U. S.*, 16 F. 2d 59. If the Congress has not declared an act to be a crime against the United States then no American tribunal has the power to treat it as such (*U. S.* v. *Reese,* 92 U. S. 214), as the only offenses against the United States are those declared by the Congress (*U. S.* v. *Grossman,* 1 F. 2d 941; *U. S.* v. *Flores,* 289 U. S. 137). The congressional power to define and punish crimes may not be delegated to the Executive or Judicial branches of the Government in either war or peace time. (*U. S.* v. *L. Cohen Grocery Co.,* 255 U. S. 81). This is equally true of military crimes. Offenses against the Laws of War are, of course, in a different category and may be punished even though Congress has not acted. (*Ex parte Quirin, supra*). A violation of the Laws of War is not charged here, nor are the Common Laws of War in any way involved. Here a violation of a specific foreign law was charged. Under elementary rules of law, one sovereign power may not enforce the criminal laws of another sovereign against its own citizens. (*The People* v. *Price,* 250 Ill. 109; *Marshall* v. *Sherman,* 148 N. Y. 9; *Rose* v. *Himley,* 2 U. S. 87; *Leftridge* v. *Western Union Telephone Co.,* 210 S. W. 18; *Levine* v. *State,* 110 N. J. L. 467; *Commonwealth* v. *O'Keefe,* 298 Pa. 169; *United States* v. *Adams,* 26 F. 2d 141; *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99; *The Antelope,* 6 U. S. 337.)

Counsel contends that a serious and dangerous precedent has been set and that, unless this Court acts, the path on which we are being led first by the military and now by the State Department is fraught with danger.

It is the contention of the Petitioner that under the Constitution and laws of the United States she was to be tried pursuant to the provisions of the Articles of War and the Manual for Courts Martial for the substantive offenses defined in the said Articles, and that she was entitled to all the safeguards which those laws afforded her. It is also her contention that the jurisdiction of courts-martial was exclusive—a subject matter discussed in Point II—but that even if it were not exclusive, that she was nevertheless not legally and properly tried—a subject discussed in Points III and IV.

The Respondent's contention, in brief, seems to be that the military authorities and the State Department officials are not bound by the Articles of War and the Manual for Courts Martial because of the provisions of Article of War 15, and that they were free to invoke any system of law to try Petitioner—an American citizen.

Article of War 15 gave them no such power.

POINT II

General courts-martial have *exclusive* jurisdiction over all persons subject to military law for offenses enumerated in the Articles of War when such offenses are committed outside the territorial limits of the United States.[19]

In *Ex parte Gerlach,* 247 F. 616, decided in 1917, the Court (Augustus N. Hand) said:

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[19] Except for violations of Articles of War 80, 81 and 82, in which cases, courts-martial and military commissions have concurrent jurisdiction, such concurrent jurisdiction exists only because Congress has so declared in the Articles of War themselves.

Within the United States, of course, our State and Federal courts have concurrent jurisdiction with that of courts-martial (Manual for Courts-Martial, 1949, par. 11; *Caldwell* v. *Parker,* 252 U. S. 376).

"The section of the Articles of War *subjecting persons accompanying armies* to military authority not only enables military officers to preserve order on the part of such persons, but also in the cases that it covers to call on them for assistance and direct their action while they are properly in the field of military operations. *The court-martial, therefore, had exclusive jurisdiction by the terms of the Articles of War over this man,* who not only accompanied the army, but volunteered to serve, unless the Act of Congress, which adopted the Articles of War, is unconstitutional." (Italics supplied.) (pp. 617-618)

In *Coleman* v. *Tennessee,* 97 U. S. 509, it appears from the facts that one Coleman, who was in the military service of the United States, committed murder while the northern armies were in occupation of Tennessee. He was tried before courts-martial and convicted. Because the sentence was not carried into execution, he was brought to trial a second time for a violation of the Tennessee law and again convicted. He contended that the second trial constituted double jeopardy. A writ of habeas corpus was issued, and this Court sustained the writ, not on the ground of double jeopardy, but on the ground that courts-martial jurisdiction was exclusive and that persons amenable to military jurisdiction were not subject to the law of the occupied territory. Mr. Justice Field, writing for this Honorable Court, stated:

"* * * when the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offenses committed by them. They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished * * *" (p. 515).

"In other words, the municipal laws of the State, and their administration, remain in full force so far as the inhabitants of the country are concerned, unless changed by the occupying belligerent (Halleck, Int. Law, c. 33)."

"This doctrine does not affect, in any respect, the exclusive character of the jurisdiction of the military tribunals over the officers and soldiers of the army of the United States in Tennessee during the war; for, as already said, they were not subject to the laws nor amenable to the tribunals of the hostile country. The laws of the State for the punishment of crime were continued in force only for the protection and benefit of its own people" (pp. 517-18).[20]

The opinion of Mr. Justice Field was concurred in by the entire Court except Mr. Justice Clifford, who was of the opinion that double jeopardy alone was involved.

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[20] Continuing, Mr. Justice Field, in the *Coleman* case, said:

"In thus holding, we do not call in question the correctness of the general doctrine asserted by the Supreme Court of Tennessee, that the same act may, in some instances, be an offence against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee. But here there is no case presented for the application of the doctrine. The laws of Tennessee with regard to offences and their punishment, which were allowed to remain in force during its military occupation, did not apply to the defendant, as he was at the time a soldier in the army of the United States and subject to the articles of war. He was responsible for his conduct to the laws of his own government only as enforced by the commander of its army in that State, without whose consent he could not even go beyond its lines. Had he been caught by the forces of the enemy, after committing the offence, he might have been subjected to a summary trial and punishment by order of their commander; and there would have been no just ground of complaint, for the marauder and the assassin are not protected by any usages of civilized warfare. But the courts of the State, whose regular government was superseded, and whose laws were tolerated from motives of convenience, were without jurisdiction to deal with him." (pp. 518-19)

Later opinions indicate that the dissenter was in error (*Grafton* v. *U. S.*, 206 U. S. 333).

In the *Ybarbo* case hereinabove referred to, Justice Clark commented as follows: "That part of the opinion of the Court (the United States Supreme Court in the *Coleman* case) dealing with courts martial jurisdiction is *dictum.*" This was said by the justice despite the fact that the *Coleman* case has been cited with approval by later opinions of this Honorable Court, the Circuit Courts, and by many eminent writers on the subject. See *State of Tennessee* v. *Hibdom*, 23 F. 795; *Caldwell* v. *Parker*, 252 U. S. 376; *Tucker* v. *Alexandroff*, 183 U. S. 424; *Hamilton* v. *McClaughry*, 136 F. 445; *Anderson* v. *Crawford*, 265 F. 504; *Kahn* v. *Anderson*, 255 U. S. 1; *Ex parte King*, 246 F. 868; *Ex parte Duncan*, 66 F. Supp. 976; *Sugar Estates' Co.* v. *U. S.*, 39 Ct. Cls. 225; *U. S.* v. *McBratney*, 104 U. S. 621; *Ex parte Mason*, 105 U. S. 696.

As is demonstrated in Points III and IV, Article of War 15 did not change the rule of the *Coleman* case, nor was Article of War 15 intended to modify or alter the time-honored and universally recognized principle that the personnel of an invading army is subject to the exclusive jurisdiction of its own country's miltary laws when in occupied territory.

Following the *Coleman* case, this Court had occasion to pass on the same question in *Dow* v. *Johnson*, 100 U. S. 158. The same principles were adhered to. In the *Dow* case, at p. 165, this Court said:

> "When, therefore, our armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy's country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account. As was observed in the recent case of *Coleman* v. *Tennessee*, it is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and

criminal jurisdiction. The law was so stated in the celebrated case of *The Exchange*, reported in the 7th of Cranch. Much more must this exemption prevail where a hostile army invades an enemy's country."

Continuing at p. 170, this Court said:

"The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country: it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty."

If, as was contended by Respondent, the military government courts and their successor tribunals, the Allied High Commission Courts, were substitutes for the local courts, which were suspended during the period of our occupation, then our tribunal functioned in the capacity of local courts. Local courts may not enforce its law against the members of an invading or occupying army.[21]

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[21] This Honorable Court, in *Dow v. Johnson*, has this to say on that subject:

"There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity, and as little likelihood of freedom from the irritations of the war, in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army. It is difficult to reason upon a proposition so manifest; its correctness is evident upon its bare announcement, and no additional force can be given to it by any amount of statement as to the proper conduct of war. It is manifest that if officers or soldiers of the army could be required to leave their posts and troops, upon the summons of every local tribunal, on pain of a judgment by default against them, which at the termination of hostilities could be enforced by suit in their own States, the efficiency of the army as a hostile force would be utterly destroyed." (p. 165)

Commenting on the *Dow* v. *Johnson* case, Mr. Justice Clark, in the *Ybarbo* case, p. 223, had this to say: "The Supreme Court, by the same Justice Field, upheld the lower court in dismissing the action and as in the previous case (*Coleman* v. *Tennessee*), fought the war again by declaring that all members of the occupying Union Armies were exempt from the jurisdiction of the local civil courts. It is quite apparent that the defense the learned Justice relied upon was not needed. * * * So again the learned Justice indulges in *obiter dictum*, * * *"

Despite the criticism leveled against Mr. Justice Field and the rulings of this Honorable Court, the *Coleman* and *Dow* cases state the law which accords with an opinion of Chief Justice Marshall in *The Exchange* v. *McFaddon*, 11 U. S. 116, decided about sixty-five years earlier and many cases decided later.

Winthrop, in his work on *Military Law and Precedents*, 2nd Ed., 1920 Rep., at pp. 81-82, cites the case of *Coleman* v. *Tennessee* with approval, and points out that under international law the Articles of War which govern our military forces as a separate community are applicable extra-territorially. All writers on international law agree with the holding in the *Coleman* v. *Tennessee* case, that the personnel of an army of occupation is exempt from the civil and criminal jurisdiction of the place occupied or which they pass through with the consent of the sovereign power of the area. Chief Justice Marshall expressed the principle in *The Exchange* v. *McFaddon*, at p. 138, thus: that the sovereign "is understood to cede a portion of his territorial jurisdiction, where he allows the troops of a foreign prince to pass through his dominions."[22]

If the personnel of the army are exempt from the civil and criminal jurisdiction of an area which they enter with

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[22] See also: Wheaton, *Elements of International Law*, 1929 Ed., Sec. 95, p. 231; Hyde, *International Law*, Vol. 1, Sec. 247; Oppenheim, *International Law*, Vol. 1, 4th Ed., Sec. 145; Hall, *International Law*, Sec. 56; Lawrence, *Principles of International Law*, Sec. 107, p. 246; Fraenkel, *Military Occupation and Rule of Law*, 1944 Ed., p. 66; Moore, *International Law Digest*, 1906 Ed., Vol. II, Sec. 251.

consent, it follows that they are likewise exempt from the civil and criminal jurisdiction of an area which they conquer. This principle is taught in the United States Military Academy at West Point. See *Constitutional Powers and Limitations*, 2nd Ed., pub. by Dept. of Law of the U. S. Military Academy, 1947. It is therein stated:

> "* * * all members of the United States Army are subject to the jurisdiction of its court-martial. Yet, while the army is within territorial limits of the United States the civil courts, both Federal and State, have certain *concurrent* jurisdiction over its members * * * However, the jurisdiction of courts-martial becomes *exclusive* when the Army leaves its own territorial limits, as for instance, when the Army marches through a *friendly country* or is stationed therein. In such cases, consent of the friendly government for exemption from its civil and criminal jurisdiction is assumed as a matter of course; should it deny this consent and act otherwise, it would give rise to serious consequences. Since this is the rule in regard to *friendly territory, it should be clear, a fortiori (for a stronger reason), that when the Army invades or occupies enemy territory it is wholly exempt from the jurisdiction of that country's courts.*"

In *Hamilton* v. *McClaughry*, 136 F. 445, at p. 448, the Court said:

> "Under the well-settled principles of law the offenders so tried were not amenable to the laws of the government of China, and the offenses by them committed, if any, whether by the laws of this country denominated as the crime of murder, robbery, larceny, or other felony, were not committed in violation of any law of China, because done by persons in the military service of this country while stationed in China."

Brig. Gen. Betts, the theatre Judge Advocate for the European Command (1945-6), and formerly Professor of Law in the U. S. Military Academy, said in an article appearing in Vol. IV, Federal Bar Association Journal, at p. 27:

> "This jurisdiction of a military government, so far as concerns its punitive application by military tribunal, is exercised through military commissions and provost courts. * * * In practice, offenders in such occupied territory who are not subject to the Articles of War, but who by the Laws of War are subject to trial by military tribunal, are tried by military commissions or provost courts. * * * Such tribunals exercise no civil jurisdiction, only criminal jurisdiction over violators of the Laws of War and for crimes against the civil laws being enforced by the occupying Army, by offenders not subject to the Articles of War. *All such as are liable to the Articles of War remain subject to the exclusive jurisdiction of courts-martial for violations thereof.*" (Emphasis added.)

If, as appears from the above, substantive and procedural law governing the military establishment, is alone applicable when our Army is in foreign territory, by what authority was this Petitioner made amenable to the local substantive law and denied trial by courts-martial as prescribed by the Articles of War? We are not here confronted with a case where an offense was committed by a person subject to military law within the territorial bounds of the United States. In such a case, there is no doubt but that both the military and civil authorities exercise concurrent jurisdiction. (*Caldwell* v. *Parker,* 252 U. S. 376.)

In 1863, in a book entitled "The Judge Advocate's *Vade Mecum,*" the author, Col. C. H. Lee, said in Sec. 12:

> "In the exercise of this power, Congress has itself ordained a military code, in the Rules and Articles of War, which each officer of the Army is required to subscribe. The President, as Commander-in-Chief of the Army and Navy, is the executive who is to administer this code. He can neither add to, nor take from it; and though he is authorized by the laws to make rules and regulations for both Army and Navy, they cannot be inconsistent with the fundamental law of the land, or with what may be called the groundwork of our military law, as expressed in the Articles of War; *neither*

can he 'ordain any penalty, or military crime not expressly declared by Act of Congress.'" (Emphasis added.)

If the President of the United States could not declare as a punishable offense, a crime not expressly declared to be such by Congress, his subordinate officers were likewise without power to do so, and any attempt by General Clay or Mr. McCloy to decree the provisions of the German Criminal Code applicable to this Petitioner, who was a person subject to military law, is null and void. This is so, aside from the question as to whether she could be tried by any military tribunal other than courts-martial (*United States* v. *Symonds,* 120 U. S. 46, 49-50).

Congress, within the field expressly and exclusively reserved to it, enacted the Articles of War which deal, not only with the substantive offenses, but with the modes of procedure to be followed in cases involving military personnel—soldiers, officers, persons serving with the army, persons accompanying the army, etc. Within the territorial limits of the United States, concurrent jurisdiction over offenses is sometimes exercised by local State or Federal courts (*Caldwell* v. *Parker, supra; People* v. *Denman,* 177 P. 461). When outside the territorial limits of the United States, that law (the Articles of War) becomes exclusive whether our armed forces be in occupation of an enemy territory or stationed in friendly foreign territory (*Coleman* v. *Tennessee, supra*).

Being exclusive, the attempt *to make this Petitioner amenable to a foreign law* which she could not read or understand and which no American lawyer, after careful study, could completely understand, *and to subject her to trial before an occupation court* regardless of the name by which it was called, is violative of the Constitution and laws of this country and therefore null and void.

POINT III

Article of War 15 did not grant power to try "persons subject to military law" before a military commission for any offense specifically made punishable by the Articles of War, except as provided in Articles of War 80, 81 and 82.[23]

The history, jurisdiction, functions, procedure, etc., of military commissions are set forth in Winthrop's *Military Law and Precedents*, 2nd Ed., 1920 Rep., pp. 831-862. In brief, the military court which came to be known as a military commission was first ordered by General Scott during the Mexican War (Order No. 20, 19 Feb. 1847). The occasion was the fact that jurisdiction in courts-martial proper was restricted almost exclusively to military personnel and to specific offenses enumerated in the Articles of War. Courts-martial jurisdiction did not extend to criminal acts of the inhabitants of the occupied territory, nor did it extend to that class of crimes against the Laws of War which today are generally referred to as "war crimes." A separate war court was necessary and is authorized as a proper agency of the Constitutional power to wage war. (*The Grapeshot*, 76 U. S. 129; *Leitensdorfer* v. *Webb*, 61 U. S. 176.) Such courts may be called by any name. (*State* v. *Hall*, 65 Tenn. 3.)[24]

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[23] This argument is predicated upon the assumption that the tribunal which tried Petitioner was a military commission or other military tribunal within the meaning of Article of War 15. Under Point IV we shall demonstrate that it was neither a military commission nor other military tribunal, but a self-ordained body not properly created and wholly devoid of jurisdiction over either the person or the offense charged, and that it functioned without due process of law and in utter disregard of congressional mandates.

[24] Such war courts have been called Provisional Courts, Provost Courts, Military Tribunals, Special Courts-Martial, Occupation Courts, Courts of Inquiry, Superior Military Courts, Military Government Courts, Council of War, Board of Officers, and by other names—but all fall within the general term "Military Commission".

The jurisdiction of the early military commissions, in general, extended to persons in occupied territory who committed ordinary

The jurisdiction of military commissions, generally speaking, extended to all persons within the occupied territory, except those persons who were subject to the military law of the occupant. In two instances, however, even persons subject to the military law of the occupant were amenable to its jurisdiction, one, for offenses which constituted a violation of the Laws of War, i.e., spying, pilferage, aiding the enemy, abusing a prisoner, etc.; two, when jurisdiction was specifically conferred on it by statute, such as the Enrollment Act of 1863 (since repealed) or Articles of War 80, 81 and 82. In so far as the inhabitants of the occupied area were concerned, jurisdiction over them extended to all criminal violations of the duly issued orders of the military commander, to all violations of the Laws of War and to all violations of the local criminal laws, committed during the time of actual military occupancy.[25]

Persons subject to the Articles of War, accused of a wrong declared to be a punishable offense in any one of the Articles of War, were not and are not subject to trial by military commission except as noted in the paragraph above. (See collation of decisions in Dig. Op. Jag. 1912,

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crimes, assault, larceny, etc., as distinguished from crimes "in violation of the laws of war. A separate tribunal designated "Council of War" was inaugurated by General Scott to try the latter class of offenses. "The Council of War" differed from a military commission in respect to the class of cases referred to it. It was a short-lived institution and but few proceedings were tried before it, involving in the main guerrilla warfare (then regarded as illegal), enticing soldiers to desert the service of the United States, etc. The charges were labeled as being "in violation of the laws of war".

During the Civil War, the jurisdiction of the military commission was by practice extended to include offenses against the laws of war (war crimes) and the "Council of War Court" passed out of existence.

[25] War Dept. Basic Field Manual, F. M. 27-5, par. 25a, 22 Dec. 1943; Winthrop, *Military Law and Precedents, supra*, pp. 831-862; *Ex parte Quirin, supra*, p. 31; Fairman, *Law of Martial Rule*, pp. 272, 184 et seq. and cases there cited; Cowan, *The Military Commission*, 29 Va. L. R. 317; *Digest of Opinions of the Judge Advocate General*, 1912, pp. 1062-1072.

pp. 1069-70, some of which are more fully reported in the footnote below.) [26]

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[26] In 7 Records, Judge Advocate General, at p. 440, the Judge Advocate General wrote: "J.A.G. Office, April 5, 1864. 1. Respectfully returned to Major General Banks and his attention invited to the 65th Article of War and Paragraph 896, Army Regulations. Attention is also invited to the fact that *under the first charge an offense is alleged of which a military commission had not jurisdiction, it being a crime denounced in the Articles of War triable by a general courts martial. The proceedings so far as they relate to this charge therefore should be disapproved.* * * * J. Holt, J.A.G."

In 1 Records, J. A. G. at p. 468, Dec. 20, 1862, the following appears: "The offence for which this officer was tried was a clear violation of the 52nd Article of War, of which a General Court Martial would have had jurisdiction. * * * *A military commission had no power to* dismiss him from the Service, nor to *try him for a purely military offense, defined in the Articles of War.* * * * J. Holt, Judge Advocate General."

In 9 Records, J. A. G., at p. 236, the following appears: "These prisoners (American soldiers) were tried by Military Commission. The proceedings were irregular. *Offenses denounced by the 52nd Article of War (abandoning post, misbehaving, plunder, pillage, etc.) should be tried by General Court Martial. The records were returned to General Banks April 17, 1864, with a suggestion that, if deemed necessary, the men could be brought to trial before the proper tribunal.*"

In 7 Records, J. A. G., at p. 486: "J. A. G. Office, April 7, 1864. Respectfully returned to M. G. Banks. *The offense*—absenting himself from his post for the purpose of pillage and plunder—of which the prisoner in this instance was convicted, *is one which the 52nd Article of War expressly provides shall be punished by the sentence of a general courts-martial, and there being no law bringing it within the jurisdiction of a military commission, it must be held that the proceedings in this case were illegal, and that the sentence pronounced is void.* If it is considered that this man should not escape punishment, he may be brought to trial before a proper tribunal for the same offense of which he was found guilty by the military commission. J. Holt, J. A. G."

The following decision, which appears in 15 Records of the J. A. G., p. 373, reiterates the rule that a military commission had no jurisdiction over a person in our military service to try for an offense which was not by statute made specifically triable before it. "War Department, Bureau of Military Justice, June 16, 1865. Respectfully returned to Major General Ord, Commanding Department of Virginia, or his successor. *The within named officer is tried by military commission on the charge of 'conniving at robbery' and 'conduct prejudicial to good order and military discipline'* and

In the Courts below, Respondent admitted that a Military Commission *would not have jurisdiction* over a person subject to military law if the offense charged were labeled as a "violation of the Articles of War." (Resp. Reply Brief, U. S. Dist. Court, p. 4.) The Respondent then urged that if the authorities chose to charge "a violation of the local law," in cases where the act also violated local law, then the Military Commission *does have jurisdiction.*

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sentenced to forfeiture of two months' pay. The Act of March 3, 1863, section 30 [since repealed], provides for the trial by military commissions or courts martial of certain specified offenses, including robbery, but not specifying the alleged offense of *connivance* at robbery. *The charge of conduct prejudicial to good order and military discipline is triable only by courts martial. It is concluded, therefore, that in the present case, the tribunal before which the accused was tried, was without legal jurisdiction and that the proceedings are consequently improper and should be set aside.* W. W. Winthrop, Major and J. A., in absence of J. A. G."

In Vol. 7, Records, J. A. G., p. 418, General Holt wrote General Carleton, among other things, that Benets Military Law contained a concise summary of the powers of military commissions. He said: "J. A. G. Office, March 31, 1864. Brigadier General James H. Carleton, General, In reply to your letter of the second instant, etc. * * * At pages 14, 15 and 16 of Benets Military Law, edition 1862, you will find a concise summary of the powers which military commissions are regarded as competent to exercise. Very respectfully, J. Holt, J. A. G."

The material parts of Benets Treatise on Military Law (1862) read: "In carrying on war in a portion of country occupied or threatened to be attacked by an enemy, whether within or without the territory of the United States, crimes and military offenses are frequently committed, which are not triable or punishable by courts-martial, and which are not within the jurisdiction of any existing civil courts. Such cases, however, must be investigated, and the guilty parties punished. * * * This is usually done by courts-martial; but in our country these courts have a very limited jurisdiction, both in regard to persons and offenses. Many classes of persons cannot be arraigned before such courts for any offense whatever, and many crimes committed, even by military officers, enlisted men, and camp retainers, cannot be tried under the 'Rules and Articles of War.' *Military commissions should be resorted to for such cases, and these commissions should be ordered by the same authority, be constituted in a similar manner, and their proceedings be conducted according to the same general rules as courts-martial, in order to prevent abuses which might otherwise arise.*" (Italics supplied.)

In other words, the choice made and the label employed are the determining factors. It is common knowledge that every major offense, defined in the Articles of War, is also an offense against the local laws of all countries. Respondent's theory is novel, to say the least, but certainly devoid of merit. The label employed by the military authorities seems a very thin basis for snatching jurisdiction over an American citizen "subject to military law", from the duly constituted courts-martial, with all its safeguards, and transfer same to a tribunal which functions entirely according to the will of one man.

The language of Article of War 15 on its face indicates that concurrent jurisdiction was *not* vested in the military commission with respect to any and all offenses nor with respect to any and all offenders, but only with respect to such *offenders and offenses "that by statute or the law of war"* were triable before such military commissions at the time of the enactment.

Article of War 15, first enacted in the 1916 Code, authorized concurrent jurisdiction "in respect of offenders or offenses that by *the law of war* may be lawfully triable by such military commissions," etc. The words "by statute or" were added in the 1920 Code, and the word "lawfully" appearing before "triable" was omitted. Other than these changes, the language used in the 1916 and 1920 Codes is identical. Brig. Gen. Enoch J. Crowder, the Judge Advocate General, testifying before the Armed Services Committee in 1916, explained the meaning and purpose of the enactment. Nothing that he said can be construed to grant the powers sought to be exercised in this case or authorize the procedure here employed.[27]

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[27] General Crowder said: "Sub-heading (d) of Article 2, which corresponds to Article 63 of the existing Code, introduces the words 'all persons accompanying' so as to make subject to the Article a class of persons who do not fall under the designations 'retainers to the camp' and 'persons serving with the Armies in the field,' etc. * * * The purpose is to give full disciplinary authority over these three classes of persons when the Army may be in peaceful transit

It will be noted that General Crowder stated specifically that, *"It* (Article of War 15) just saves to these war courts *the jurisdiction they now have,"* and that, *"Both classes of courts have the same procedure"*—this latter sentence was

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through a foreign country, or where, as in Cuba in 1906, there is intervention in a foreign country falling short of war. * * *

"In the present condition of our Articles of War 'retainers to the camp' (i.e., officers, servants, newspaper correspondents, telegraph operators, etc.), and 'persons serving with the Armies in the field' (i.e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials and employees of the provost marshal general's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the period and pendency of war and while in the theatre of military operations. *A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjugation to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the Article has been expanded to include also persons accompanying the Army.* The existing Articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace in places to which the civil jurisdiction of the United States does not extend and *where it is contrary to international policy to subject such persons to the local jurisdiction,* or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances. * * *

"Article 15 is new. We have included in Article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our criminal law war court. It has no statutory existence, though it is recognized by statute law. *As long as the Articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by courts-martial, I was afraid that, having made a special provision for their trial by courts-martial, it might be held that the provision operated to exclude trials by military commissions and other war courts;* so this new Article was introduced: (quotes Article of War 15).

"It just saves to these war courts the jurisdiction they now *have,* and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. *Both classes of courts have the same procedure"* (Sen. Bill S-3191, 64th Cong., 1st Sess., Rep. No. 130, Feb. 7, 1916. See also note 31, 327 U. S. 1, 65). (Italics supplied.)

omitted by the Court below in its quotation of General Crowder's testimony, probably because it was also omitted in the Respondent's Brief. It is, however, a revealing and most important sentence. It indicates that General Crowder did not intend to leave to the commander in the field, or to any other person, such as was done in this case, the power to deprive a citizen of his right to be tried according to the standards prescribed by Congress in the Articles of War.[28]

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[28] Congress, at the time of its enactment of Article of War 15, also enacted other Articles obviously designed to making procedure before courts-martial and military commissions practically the same. By Article of War 38 it directed that "The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, *military commissions*, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States. * * *" Pursuant to such power, the President said in paragraph 2 of the 1928 Manual for Courts Martial, and again in the 1949 edition, that *military commissions* so far as not otherwise provided, "have been usually guided by the applicable rules of procedure and evidence prescribed for courts-martial."

Congress, by its enactment of Article of War 24, specifically directed that "No witness before a military court, commission, * * * shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, * * *." Not only was this rule not followed in the courts established in Germany, but the rules of practice and procedure "generally recognized in the trial of criminal cases in the district courts of the United States," as provided for by Article of War 38, were likewise not followed. See statement of Gen. Joseph T. McNarney, Commanding General of U. S. Forces in Europe, dated December 6, 1946 JAGJ 1946/7691, wherein he said:

"Under the existing military government ordinances and regulations, military government tribunals lack many of our recognized Constitutional guarantees and procedural safeguards which are preserved in court-martial proceedings. * * * The rules of procedure are based to a considerable extent on Continental legal practice, rather than upon concepts accepted as American. At present there is no protection afforded an accused under these rules against self-incrimination, and a military government court could draw unfavorable inferences from an accused's refusal to answer. There are at present no rules prohibiting the introduction of hearsay evidence. It is believed that the trial of American civilian dependents by mili-

To determine the extent of the jurisdiction reserved to military commissions by Article of War 15, it is necessary to ascertain the extent of their jurisdiction at the time of the enactment of said Article and not the extent of their jurisdiction at any other time. General Crowder's statement obviously refers to the jurisdiction authorized to be exercised by military commissions in the year 1916 when Article of War 15 was enacted, and not the jurisdiction which was authorized pursuant to the Enrollment Act of 1863, which Congress later repealed.

During the Civil War, many cases were tried by military commissions because jurisdiction was vested in them by statute—the Enrollment Act of 1863. By that Act, both courts-martial and military commissions were granted concurrent jurisdiction to try even persons subject to mili-

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tary government courts without such guarantees and safeguards would certainly be most productive of criticism."

By its enactment of Article of War 47c, Congress directed that before the appointing authority acted upon a record of a general court-martial or *military commission*, such record of trial be referred to his Staff Judge Advocate or the Judge Advocate General for review and advice, etc. It is obvious that Congress intended that the appointing authority of a military commission be the same person who is authorized to appoint general courts-martial pursuant to the provisions of Article of War 8, and it was so held in *In re Yamashita*, 327 U. S. 1.

If by any interpretation of Article of War 15, Mr. McCloy was not bound by the statutory enactments of Congress, then it is respectfully contended that the said Article is unconstitutional as denying to Petitioner due process of law in violation of the Fifth Amendment and in violation of Article I, Sec. 8, Clause 14, which vests in Congress alone the power "to make rules for the government and regulation of the land and naval forces". Such interpretation of Article of War 15 likewise denies to Petitioner the equal protection of the laws, since she was not permitted a trial or appeal as directed by Congress in the Articles of War (*Dowd* v. *U. S.*, 340 U. S. 206).

What Congress actually enacted was, presumably, predicated in part upon what General Crowder stated. Nothing in what he stated, and nothing that appears in the language of Article of War 15 itself, indicates an intent to substitute the will of the commanding general for the will of Congress and there was no discretion in anyone to deviate from the laws which were enacted by Congress (*U. S.* v. *Symonds*, 120 U. S. 46, 49).

tary law for specified major criminal offenses such as murder, rape, larceny, etc. With the repeal of the Enrollment Act of 1863, *such jurisdiction was denied military commissions* but not courts-martial. In 1874 Congress re-enacted the provisions of the Enrollment Act of 1863 with but a single material exception—the words "military commission" were omitted and jurisdiction was vested exclusively in courts-martial (Winthrop, p. 667). In footnote 15 on p. 667, Col. Winthrop states that this change, i.e., the omission of the words "military commission," was proper "* * * *for the reason that a military commission is not the appropriate tribunal for the trial of military persons.*" It thus appears that the Congressional intent was to deny jurisdiction to military commissions in cases cognizable by the Articles of War unless there was a specific reservation such as is reserved in Articles of War 80, 81 and 82.

The language of Articles of War 92 and 93, which in Winthrop's time was Article of War 58, enacted in the year 1874, indicates on its face that Congress conferred *exclusive* jurisdiction in courts-martial to try a number of major offenses, including murder, committed by persons subject to military law. No other interpretation can be placed on the language used, particularly in the light of the fact that Congress omitted the words "military commissions" which had been authorized as an appropriate tribunal, for such trials, in earlier enactments (Winthrop, pp. 666-667).[29]

It is significant to note that subsequent to 1874, no person subject to military law, as far as counsel has been able

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[29] In *Ver Mehren v. Sirmyer*, 36 F. 2d 876, 881, the Court said: "* * * Necessary steps required to be taken in a prescribed way could not be taken in some other way: a fortiori, they could not be totally omitted. This is elementary law, and was concisely stated in Raleigh, etc., R. Co. v. Reid, 13 Wall 269, 270: 'When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode'."

In *Johnson* v. *United States*, 225 U. S. 405, and in *Brewster* v. *Gage*, 280 U. S. 327, it was held that a change in phraseology indicates persuasively that a departure from the old law was in-

to ascertain, was brought to trial before a military commission for an offense cognizable by the Articles of War until the end of World War II. During World War I, and the subsequent occupation, none were so tried (Am. Mil. T. Gov't of Occupied Germany 1918-20, Vol. IV, p. 50).[30]

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[30] In the *Ybarbo* case, *supra*, p. 220, it was said: "When the Articles of War were revised in 1874, the words specifically conferring jurisdiction on military commissions were omitted. This omission caused some authorities to believe that subsequent to 1874 a military commission was not an appropriate tribunal for the trial of military persons." The Justice then concludes, p. 221, "When Congress enacted the present Article of War 15 it would seem that it did so with full knowledge that it was saving to Military Commissions the jurisdiction it had theretofore exercised over soldiers as well as civilians under the Law of War. It had the same effect as though the Enrollment Act of 1863 had been re-enacted." This conclusion is not supported by any authority and is contrary to all well-known principles of statutory construction. The Congress, by its enactment of Article of War 15, continued in military commissions only the jurisdiction which it had in 1916, the time of the enactment. Nothing was said, either expressed or implied, from which an inference may be drawn that any part of the Enrollment Act of 1863 was being re-enacted. As a matter of fact, the language used in Article of War 15 and several other Articles of War indicated just the contrary (compare the language of Articles of War 80, 81 and 82 with that of Articles of War 92 and 93).

Chief Judge Parker, in the Court below, in apparent support of Justice Clark's views, quoted extracts from the *Digest of Opinions of the Judge Advocate General*, 1912, pp. 1056-7, to show that many soldiers and civilians were tried by military commissions. Certainly there were many persons subject to military law, soldiers and civilians alike, who were tried before military commissions during the Civil War period. That was due entirely to the fact that Congress had authorized the use of such tribunals. But when Congress changed the law by its repeal of The Enrollment Act of 1863, and by its enactment of Article of War 58 in 1874 (later changed to Articles of War 92 and 93), it divested military commissions of such jurisdiction and vested it exclusively in courts-martial.

The District Court (Hon. Ben Moore) took the position that Article of War 15 vested concurrent jurisdiction over all crimes of every nature in military commissions regardless of the restrictive language of Article of War 15 itself. He interpreted the words "the law of war" to include offenses of every description. Wholly disregarded were the decisions of this Court in *Ex parte Quirin, supra*, and *In re Yamashita, supra*, which define the words "Laws

Even during the period when the Enrollment Act of 1863 was in force, by the construction given that Act by the military authorities, "persons subject to military law" were not permitted to be tried before military commissions for offenses specifically made punishable in the then-existing Articles of War (Dig. Op. JAG 1912, pp. 1063-72). As hereinabove pointed out, in every case where the exercise of such jurisdiction was attempted, the Judge Advocate General voided the conviction.

In *Digest of Opinions of the Judge Advocate General*, 1912, at pp. 1064-65, the following appears:

> "I C 8 a (2)(a). * * * In the Civil War such courts [military commissions] were not unfrequently constituted and were commonly designated *provost courts*. *R. 2, 14, Feb., 1863; 15, 519, July, 1865. Such courts had no jurisdiction of purely military offenses (i.e., offenses which the Articles of War make cognizable by court-martial)*, and were therefore not properly authorized to impose forfeitures of pay or other strictly military punishments upon officers or soldiers of the Army. *R. 6, 635, Dec. 1864; 8, 638, 10, 39 and 560, 13, 55 and 114, July to Dec. 1864.* These courts

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of War" contrary to Judge Moore's views. Under the construction given Article of War 15 by the District Court, the words used by Congress, namely "in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions," are superfluous. General Crowder's testimony indicates that these words had definite meaning and that Article of War 15 merely reserved to military commissions the jurisdiction which they had in 1916 and not jurisdiction exercised under some theretofore repealed statute.

The jurisdiction of a military commission was not "plenary in scope," as Judge Moore held. A distinction always existed between an offense made punishable by the Articles of War and an offense made punishable by the laws of war. See Dig. Op., JAG 1912, p. 495, case No. III E 3b, where it was said: "As desertion and joining the enemy and taking service with him are two distinct offenses, held that desertion would ordinarily be tried by a general court martial as a violation of the Articles of War, while joining the enemy would be tried by a military commission as a violation of the laws of war." Now by reason of the provisions of Article of War 81, joining the enemy and taking service with him may be tried by either court, but desertion may not be tried by military commissions *because it is not an offense which by statute or by the law of war is made triable by such military commission.*

were in general resorted to as substitutes for the ordinary police courts of cities, and their jurisdiction was in general confined to cases of breaches of the peace and of violation of such civil ordinances or military regulations as might be in force for the government of the locality. *R. 13, 392, Feb. 1865.*"

The Courts below did not give cognizance to much of the language used in Dig. Op., JAG 1912, pp. 1069-70, although partial quotations were taken from this volume. Directly in point on the issue here is the following:

"I C 8 a (3)(c)(3). It is a further restriction upon the jurisdiction of the military commission that, except where it may be invested by statute with a jurisdiction *concurrent* with that of courts-martial (as by secs. 30 and 38 of the act of Mar. 3, 1863), *its authority can not be extended to the trial of offenses which are, specifically or in general terms, made cognizable and punishable by courts-martial by the Articles of War or other statute. In repeated instances during the Civil War the proceedings of military commissions, in cases in which these tribunals had improperly assumed jurisdiction of offenses legally triable by courts-martial only were recommended by the Judge Advocate General to be disapproved. R. 468, 482, Dec., 1862; 7, 440, 486, Apr., 1864; 9, 236, June, 1864; 15, 373, June, 1865; 16, 73, Apr., 1865; 19, 63, Oct., 1865.*" (Italics supplied in part.)

The only statutory jurisdiction which military commissions had over "persons subject to military law," in the year 1916 was in cases involving spies (Dig. Op., JAG 1912, p. 1068, case no. I C 8 2 (3)(b)[3]). At the present time there are two additional offenses, added by statute, for which the military commission may try our military personnel, i.e. aiding the enemy and dealing in captured property (Articles of War 80, 81 and 82). The *Manual for Courts Martial,* 1928, p. 9, cites Articles of War 80-82 as the only examples of offenses which, by statute, are so triable before military commissions. The 1949 Manual for Courts-Martial, p. 11, states substantially the same thing.

The *Ybarbo* case recognized that Article of War 15 did not confer general jurisdiction on military tribunals fully concurrent with that of court-martial, but conferred only limited jurisdiction in respect of certain offenders and offenses which by "statute" or the "law of war" were made so triable. Mr. Justice Clark ruled that a wife who killed her soldier husband in the occupied Zone did *not* violate the law of war. [Judge Moore ruled directly the contrary. The Court of Appeals approved both rulings.] To sustain jurisdiction, therefore, Mr. Justice Clark had to find that the offense for which Mrs. Ybarbo was tried was authorized "by statute" to be tried before a military commission. But there is no statute upon which the learned justice was able to rely to sustain his position. He, therefore, urged at p. 219 as follows: "The draftsmanship of this Article (A. W. 15) is perhaps unfortunate. It does not, as it might, refer specifically to civil crimes, but confines its reference to offenses proscribed by statute or the laws of war. We are not concerned here with the latter as we would have been if the defendant had killed a German national. It is, however, permissible, we think, to interpret the word 'statute' in the sense that by the word is meant any enactment which has the support of paramount authority. In that sense is included not only statutes passed by a United States legislature, but also a German law, adapted by a military governor."[31] The argument that the decree of a military governor is on a par with a Congressional enactment lacks merit because a "statute" is the express written will of the legislature

[31] No reference is made to any document or decree adopting such German law. In fact, no such adoption was ever made. General Clay, as far as counsel has been able to ascertain, never issued any decree which can be interpreted as making German law applicable to the Occupation Forces. General Eisenhower's proclamation continuing German law was directed specifically "to the German people" (R. 103). Furthermore, the Theatre Judge Advocate, European Command, has stated that American dependents while sojourning in Germany do not administratively or legally become merged with the people of Germany (JAGJ 1946/7691, 10 Dec. 1946).

(*Federal Trust Co.* v. *East Hartford Fire Dist.*, 283 F. 95), which, in the United States, means an act of Congress and not a military order.

The earliest known document relating to military commissions is General Order #20, Feb. 19, 1847. It reads in part:

> "* * * that no military commission shall try any case clearly cognizable by any court-martial. * * *"

Such rule was followed for almost 100 years. General Holt, the Judge Advocate General, prevented any deviation therefrom during Civil War days and Petitioner respectfully asks this Honorable Court to prevent present-day deviation, which have been attempted in Europe. The awesome-sounding name given the self-ordained tribunal which tried Petitioner, does not vest it with more power than that heretofore exercised by military commissions, and Article of War 15, by its very terms, did not pretend to enlarge that jurisdiction.

The Rule has recently been stated in Articles of War Annotated, 5th Revised Ed., 1949, by Lee S. Tillotson (Col., JAGD, USA, Ret.), as follows, p. 45:

> "3. Military Commissions have no jurisdiction over civil actions. *Except where they have been invested by statute with a jurisdiction concurrent with courts-martial (as in Articles 80, 81 and 82) their authority cannot be extended to the trial of offenses which are specifically, or in general terms, made punishable by courts-martial by the Articles of War or other statutes* (12-1069, 1070)." (Emphasis added in part.)

War Dept. *Basic Field Manual*, F.M. 27-10, October 1, 1940, entitled "Rules of Land Warfare," par. 7, also stated the general rule as follows: "* * * While general courts martial have concurrent jurisdiction with military commissions and provost courts to try any offender who by the law of war is subject to trial by military tribunals, it has generally been held that military commissions have no jurisdiction of such purely military offenses specified in the

Articles of War as those Articles expressly make punishable by sentence of court martial (except where the military commission is also given express statutory jurisdiction over the offenses (A.W. 80, 81, 82))."

The cases relied upon by Respondent and cited by the Courts below, hold nothing contrary to what is stated hereinabove, and are wholly inapplicable.[32]

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[32] *Mechanics' etc. Bank* v. *Union Bank*, 89 U. S. 276, involved a *civil litigation between enemy nationals* in a military tribunal set up by a military commander in an occupied area, where no governmental functions were being carried on by the deposed sovereignty. Petitioner does not contend that such tribunals may not be set up by competent military authority to adjudicate the rights of enemy nationals or to punish them for criminal offenses. Such is not this case. Furthermore, in the *Mechanics' Bank* case, as the majority opinion points out (p. 297), General Butler, who established the court, "was commissioned to carry on the war in Louisiana. He was, therefore, invested with all the powers of making war, except so far as they were denied him by the commander-in-chief, and among these powers, as we have seen, was that of establishing courts in conquered territory". The opinion also points out that since the courts of Louisiana, interpreting a post-war Louisiana statute, held the decision of General Butler's court to be good, *that no federal question was presented on appeal to the United States Supreme Court.* This Court said, "* * * * it is not for us to inquire whether the Provost Court (General Butler's court) acted within its jurisdiction or not. That is a question exclusively for the State tribunals", page 297. The dissenting opinion of Mr. Justice Field discusses the limitations on the jurisdiction of military tribunals thus established.

Santiago v. *Nogueras*, 214 U. S. 260. Here the situation is somewhat similar to that which existed in the *Mechanics' Bank* case. It involved a *civil litigation between foreign subjects in a court created by military authority with the approval of the President at a time when the earlier government of the defeated power was extinct.* No constitutional or statutory right of an American citizen was involved, nor were any of the questions raised here, argued or decided in that case.

The Grapeshot, 76 U. S. 129. By proclamation of President Lincoln, dated October 1860 and later approved by Congress, a provisional court was established in Louisiana during the military occupation of that State. By consent of the parties, a proceeding in admiralty was continued in the tribunal so established. This court pronounced the well-known and oft-repeated general principle that the President of the United States, acting through the military establishment, may create courts in occupied territory to adjudicate

the rights of enemy inhabitants. Nowhere is it said or intimated that the citizens of the victorious belligerent or the personnel of its army are subject to the jurisdiction of such courts. Even though that were permitted under the Enrollment Act of 1863, later congressional enactments indicate conclusively that they were no longer so subject (Amer. Articles of War of 1874, enacted June 22, 1874; The Articles of War Act of 4 June 1920, 41 Stat. 787.

Leitensdorfer et al. v. Webb, 61 U. S. 176, and *Cross et al. v. Harrison*, 57 U. S. 164, add nothing to what has been said hereinabove. *Both cases involved civil litigation in courts set up by the military establishment in a conquered territory.*

Neely v. Henkel, 180 U. S. 109, on which the greatest stress was placed by Respondent, is likewise inapplicable. The case involved the interpretation of an extradition law (Act of June 6, 1900, c. 739, 31 Stat. 656) passed in implementation of foreign extradition treaties. It appears that petitioner, an American citizen who was a public employee of Cuba and a resident there, embezzled substantial funds and property of the Post Office Department in Havana, where he worked. He sought refuge in the United States. Cuba at that time was regarded as a foreign country (Court's Opinion, p. 119). After a full hearing on probable cause, as in such cases made and provided, the embezzler was ordered returned to stand trial in accordance with the law of Cuba. Certainly he had no rights under the Constitution and laws of the United States except insofar as extradition was concerned, all of which rights were extended to him. The gravamen of his petition upon habeas corpus was that the extradition statute was unconstitutional. No question of the legality of the courts, which were established in Cuba pursuant to treaty and congressional enactment, was raised (Opinion, p. 122), nor could it be raised at that stage of the proceeding. Neely, the petitioner, had no connection, directly or indirectly, with our armed forces in Cuba and was properly ordered returned. What relevancy the *Neely* case has to the present one is difficult to understand.

In re Ross, 140 U. S. 453, involved the legality of a trial before a consular court in Japan, established pursuant to treaty and the laws of the United States. As the Opinion in that case points out, it has been the uniform practice of civilized governments, for centuries, even preceding the Middle Ages, to vest their consuls with judicial authority to try their own subjects, for offenses committed by them, in foreign countries (pp. 462-463). That is what was done and the *Ross* case has no bearing, whatsoever, on the issues presently raised.

POINT IV

The United States Court of the Allied High Commission for Germany was not a duly constituted military commission or military tribunal.

The law with respect to the creation and composition of military tribunals is well settled (Winthrop, *supra*, p. 835-842). Unless established and composed in accordance with recognized principles of law, any determination made by it is a nullity. *Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1; *Grafton* v. *U. S.*, 206 U. S. 333; *Runkle* v. *U. S.*, 122 U. S. 543; *Dynes* v. *Hoover*, 61 U. S. 65.

In *In re Yamashita*, 327 U. S. 1, both the majority and dissenting opinions agree, that before a military commission or tribunal may be considered a legal body: (1) it must be created by proper military command; (2) it must be composed of persons lawfully authorized to act; (3) it must function at a time and place where, under the law, it is permitted to function; (4) the charges must be a violation of the laws of war or some specific statute; and (5) in cases involving "persons subject to military law", its proceedings must be in accord with the provisions of the Articles of War. The basic difference between the majority and the dissenting opinions in the *Yamashita* case involved the applicability of the Articles of War to the enemy national involved in that case. Mr. Justice Rutledge, in his dissent, pp. 61-72, argued that the Articles of War applied to all cases tried before military commissions, whereas the majority ruled that the Articles of War applied only to those persons who were classified as being "subject to military law" within the purview of Article of War 2, pp. 18-20).

The tribunal before which Petitioner was tried was neither composed according to law nor did it function in a manner prescribed by law. One of the basic requirements is that the court must be created by the same commanders as are empowered to appoint general courts-

martial (Winthrop, *supra,* p. 835; W. D. Basic Field Manual, FM 27-5, 23 December 1943; *Ex parte Quirin, supra;* Footnotes to Article of War 15). Mr. McCloy has no power under the law to appoint general courts-martial, nor could he act on the basis of delegated authority (*Manual for Courts-Martial,* 1949, par. 5a).

Another requirement is that the military tribunal be composed of officers of the Army (Winthrop, *supra, p.* 835; W. D. Basic Field Manual, FM 27-5, 23 December 1943, par. 402, 40d). Chief Justice Clark, in the *Ybarbo* case, *supra,* recognized that the tribunals functioning in Germany were not so composed and were of a different caliber. He said at pp. 210-211: "The only new and strange thing about the Military Tribunals in the Occupied Zone of Germany is their civilian character. In all other military occupations by the United States, the judges have been Army officers, not necessarily even lawyers. Here the standard of professional excellence and experience for our judges are higher than in many states of the United States. * * *"

What Justice Clark said may be true, but it does not justify a violation of the prescribed law. By the same token of reasoning, it can be argued that we should abolish our jury system and substitute therefor a panel of one, six or twelve lawyers of high professional standing and that an accused convicted before such tribunal would have no cause to complain. The fallacy of this argument need not be elaborated upon. A breach of a law or rule is not justified because someone thinks that a better result may be obtained by reason of the breach.

The practice and procedure normally followed in courts-martial cases must likewise be followed before a military commission, in a case such as this which does not involve an enemy national (*Manual for Courts-Martial,* 1949, Chap. 1, par. 2; Basic Field Manual, FM 27-5, 22 Dec. 1943[33];

[33] Practically all the requirements of W.D. *Basic Field Manual* 27-5, 22 Dec. 1943, were violated by the court system established in

In re Yamashita, supra; 29 Va. *L. R.* 317; 42 *Am. J. Int'l. Law* 832; see also, Articles of War 23, 24, 25, 26, 38, 47, 49, 53). Col. Winthrop, *supra,* states, at p. 841 that procedure before Military Commissions in the absence of statute or regulation to the contrary, is to be conducted in accordance with the procedure governing courts-martial.

The *Digest of Opinions of the Judge Advocate General,* 1912, at p. 1070, contains a general summary of what must be done to sustain jurisdiction. It will be noted that with-

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Germany. The military authorities in Germany, of course, almost always ruled in favor of their own acts, from which there was no appeal, nor was any other remedy, such as habeas corpus, available to the German people (*Eisentrager v. Johnson,* 339 U. S. 763).

Eventually it became obvious that the conflict between the War Department rules, set out in FM 27-5, and the actual practice in Germany could not continue indefinitely. Accordingly, after almost two and a half years of occupation, the Department of the Army recognized what was done in Germany as a *fait accompli.* In the year 1947 it issued a new Field Manual 27-5, dated October 14, 1947, which superseded and vacated all its earlier directives respecting military tribunals. The substituted directives accorded with the practice which was adopted in Germany—with one exception, nothing is therein contained authorizing Military Government Courts to take jurisdiction over "persons subject to military law" or over other American or Allied persons.

Regardless of what the language of the new Field Manual meant, it did not and could not change the law, even though adversely affected persons were without remedy of appeal or by habeas corpus proceedings in the duly constituted courts of the United States. The law respecting military tribunals, as recognized for almost one hundred years, was correctly stated in the 1943 Field Manual. The proof of that is the fact that the War Department issued it as a correct statement of the law. Nothing happened between 1943 and 1947, by way of legislation or judicial decision, except the ultra vires acts of the authorities in Germany, to warrant so complete a reversal of the War Department's earlier directive.

In Sec. 7, pp. 63-64, of the Field Manual dated 14 Oct. 1947, reference is made for the first time to "indigenous courts"—presumably this was intended to indicate that those courts had jurisdiction over indigenous persons only. "Indigenous" is defined in Webster's Collegiate Dictionary, 5th Ed., as "produced, growing, or living naturally in a country or climate; native." Certainly it cannot be reasonably contended that these "indigenous courts" apply to Petitioner. Nothing is said in the 1947 Field Manual which expressly or impliedly confers jurisdiction upon such occupation courts over persons "subject to military law."

out exception, every rule, there enumerated, has been violated by the Tribunal which functioned in Germany. The *Digest* reads:

"I C a (3) (d) [1]. Except in so far as to invest military commissions in a few cases with a special jurisdiction and power of punishment, the statute law has failed to define their authority, nor has it made provision in regard to their constitution, composition or procedure. *In consequence, the rules which apply in these particulars to general courts-martial have almost uniformly been applied to military commissions.* They have ordinarily been convened by the same officers as are authorized by the Articles of War to convene such courts; the accusations investigated by them have been presented in charges and specifications similar in form to those entertained by general courts; their proceedings have been similar and similarly recorded; and their sentences have been similarly passed upon and executed. *R.I. 453, 465, Dec., 1862; 2, 27, 83, 563, Feb. to June, 1863; 3, 428, Aug. 1873; 5, 95, Oct., 1863; 7, 556, Apr., 1864; 8, 111, Mar., 1864; 13, 392, Feb. 1865; 29, 39, June, 1869.* Their composition has also been the same, except that the *minimum* of members has been fixed by usage at *three.* R. 15, 149, Apr., 1865. They have generally also been supplied with a judge advocate as a prosecuting officer. A military commission constituted with less than three members, or which proceeded to trial with less than three members, or which was not attended by a judge advocate, would be contrary to precedent. *R. 9, 591, Sept., 1864; 11, 497, Feb., 1865; 13, 286, Jan., 1865; 15, 204, May, 1865; C. 17328 Jan. 4, 1905.*

"In view of the analogy prevailing and sanctioned between these bodies and courts-martial, *held* that military commissions would properly be sworn like general courts-martial (*R. 11, 111, Nov. 1864*); that the right of challenging their members should be afforded to the accused; that two-thirds of their members should concur in death sentences (*R. 23, 650, Aug., 1867*); and that the two years' limitation would properly be applied to prosecutions before them. *R. 9, 657, Sept., 1864.*

"I C 8 a (3) (d) [2]. *Held* that the proceedings of a military commission should be completed by the ac-

> tion at the end thereof of the officer who convened the commission or by his successor in command, the mode of procedure being the same as is followed by general courts-martial. *C. 5292, Nov. 8, 1898.*"

A military commission, by whatever name it may be called, like a court-martial is a tribunal of limited jurisdiction. It has no powers which are not specifically conferred upon it and its exercise of judicial power, like a court-martial, is conditioned on certain indispensable prerequisites. (*Anderson* v. *Crawford,* 265 F. 504.) Unless those prerequisites are complied with, its determinations are without binding effect. *Deming* v. *McClaughry,* 113 F. 639.) At page 650, the Court said:

> "A court-martial is a court of limited jurisdiction. It is a creature of the statute, a temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it. * * * The absence of any of these indispensable conditions renders the judgment and sentence of a court-martial coram non judice, and absolutely void, because such a judgment and sentence is rendered without authority of law and without jurisdiction. Runkle v. U. S., 122 U. S. 543; 546, 7 Sup. Ct. 1141, 30 L. Ed. 1167; Mills v. Martin, 19 Johns. 7, 30; Wise v. Withers, 3 Cranch, 331, 2 L. Ed. 457; Ex parte Watkins, 3 Pet. 193, 207, 7 L. Ed. 650; Dynes v. Hoover, 20 How. 65, 80, 15 L. Ed. 838."

The rules respecting courts-martial set out in the *Deming* case above are also applicable to military commissions. (*In re Yamashita, supra; Ex parte Quirin, supra.*)

In addition to the fact that the Allied High Commission Court was not created or composed according to law and did not function in compliance with the rules relating to military tribunals, it sat in an area where neither military government nor martial law existed. With certain exceptions not here material, a military commission or other military tribunal, even if properly organized and com-

posed, is without power to act unless it functions in an area where martial law was properly imposed or where military government actually exists. (*Ex parte Milligan*, 71 U. S. 2; *Duncan* v. *Kahanamoku*, 327 U. S. 304; *Hamilton* v. *McClaughry*, 136 F. 445; *MacLeod* v. *United States*, 229 U. S. 416; Winthrop, *supra*, 799-800). If the period of occupation is over or the area not under actual military rule, the conqueror may not exercise any of the prerogatives of a victorious belligerent.

This Honorable Court held that, if these prerequisites do not exist, the conqueror may not even enforce its decrees to collect taxes or duties imposed. A fortiori it may not establish courts or perform other acts of sovereignty (*MacLeod* v. *United States*, 229 U. S. 416, and cases therein cited).

Military government in Germany terminated on September 21, 1949, before the date Petitioner was alleged to have committed the offense, before the date Petitioner was charged before the Military Government Court, and before the date of her trial before the Allied High Commission Court. (Dept. of State Pub. #3556, pp. 88-89; 106-107, 177-188; Dept. of State Bulletin, Vol. XXI, No. 523, p. 22; Report on Germany, issued by Office of High Commissioner, p. 1; R. 32, 41-64.)

Aside from the fact that military government terminated, Mr. McCloy was not vested with any power to, at any time, appoint a military tribunal for the trial of Americans who are a part of the Armed Forces of the United States. Mr. McCloy is a civilian in the foreign service, acting under direction of the Secretary of State. (The Foreign Service Act of 1946, 60 Stat. 999; 22 U. S. Code 801-866; Dept. of State Pub. No. 3556, p. 182.) Neither by statute of the United States nor by the laws of war has a civilian employee of the State Department ever been vested with the power to appoint courts to try Americans. The commanding general or the military governor of an occupied area alone may, under certain circumstances, appoint such courts. Whether Mr. McCloy had such power during the

short time he acted as the military governor is not material here. Mr. McCloy was not the military governor nor did he exercise any military command functions in October 1949 when this case arose. Nor was he vested with any of the sovereign power of Germany. The sovereignty of Germany is exercised by the Federal German Republic. (See documents referred to above, R. 32, 41-64.) Furthermore, the "Office of the United States High Commissioner for Germany" was not vested with any of the sovereign powers of the United States sufficient to make it a complainant in a criminal charge against an American citizen, such as was done here (R. 36).[34]

In the attempt to justify the existence of the so-called United States Court of the Allied High Commission, the officials in Germany originally took the position that such courts were international and not bound by any of the laws of the United States.[35]

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[34] The argument was made by the District Court that unless the tribunal in question and its proceedings be considered legal, Americans in Germany would be immune from punishment (R. 87). Such is not the fact. The Articles of War are ample to cope with any situation involving persons subject to military law, and those who are not so subject may be tried before the German courts which were open and functioning. If such practice be not considered feasible, then such persons, as are not subject to military law, may be tried before any *duly* constituted military commission—which the tribunal in question was not.

[35] On February 4, 1949, the following appeared in the Army newspaper called "Stars and Stripes":

> "Frankfort, Feb. 4 (S&S)—U. S. courts of the Allied High Commission for Germany are international in scope and jurisdiction, and their decisions are not subject to review in the U. S., a top HICOG legal official said.
>
> "The courts have been set up under provisions of the Allied High Commission charter, an international instrument signed by the U. S., Britain and France. Federal courts in the U. S., in a recent ruling on the case of Friederich Flick, former German industrialist convicted of war crimes at the 'minor' Nurnberg

The Government has apparently adopted a different view since the institution of the habeas corpus proceeding by Petitioner. It now asserts that the tribunal which tried Petitioner was a "military commission" within the purview of Article of War 15. The Government of necessity had to discard its earlier theory concerning the international character of the court for the following reasons. First, because it conflicts with Mr. McCloy's assertion that the Allied High Commission Court was merely a change of name from the former military government courts; second, because, if the jurisdiction of the Allied High Commission Court stemmed from a source different from that of its predecessor the Military Government Court, then we would have the anomalous situation of a person being charged in one court and tried in another; third, because neither Mr. McCloy nor anyone else was authorized to turn Petitioner over to a foreign tribunal (one operating under alleged international authority) for trial, without conforming to the statutes in such cases made and provided (Title 18, U. S. Code, Sec. 3185); fourth, because conviction by a foreign or international tribunal and for a violation of foreign law does not justify or authorize imprisonment in a United States penitentiary (18 U. S. Code, Secs. 4082-4); and fifth, because the entire theory that this tribunal is in the same category as the tribunals involved in *Flick* v. *Johnson*, 174 F. 2d 983, cert. den. 338 U. S. 879, and *Hirota* v. *McArthur*, 338 U. S. 197, is devoid of merit.

Since the Court of Appeals decision in this case and on May 24, 1951, the Office of the United States High Com-

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trials, have decided they have no right to review appeals from international courts.

"Under this interpretation, cases decided in the U. S. Zone district courts can be appealed to the U. S. Zone Court of Appeals in Nurnberg, and can thereafter be brought to the attention of the Allied High Commission, but cannot be appealed beyond the commission, the HICOG legal official pointed out."

missioner for Germany enacted "Law No. 20," which establishes a "United States Court of the Allied High Commission" with judges to be known as "United States Judges for Germany." (Art. 1, secs. 1 and 2, Official Gazette of Allied High Commission, p. 919.)

Whether, by reason of the above, the State Department officials and the military establishment may revert to their former position that this new body is an "international tribunal" whose decisions this Honorable Court may not review (*Hirota* v. *MacArthur, supra*), is not known. Regardless of what is asserted, however, the fact remains that the Court which tried Petitioner was not a military commission or other military tribunal as understood in our law, more particularly Article of War 15, and its decree ordering Petitioner imprisonment for a term of years is a nullity.[36]

Conclusion

Petitioner respectfully prays that the relief sought in the foregoing Petition be granted, in order that this Honorable Court can determine whether her rights, and the rights of others similarly situated, may be made subservient to military dictates and if so, to what extent.

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[36] Other arguments and principles of law concerning the legality of Petitioner's detention, made in the Courts below, are being omitted on this Petition for a writ of certiorari. If this Honorable Court grants the relief herein prayed for, then those arguments will be made upon hearing, unless this Court directs otherwise. The other arguments involve in the main, the propriety of the length of the sentence and the place of confinement. Petitioner contends that under the German law, pursuant to which she was tried, the maximum sentence was five years; that confinement in a penitentiary was not authorized, and that her jailor is without power to detain her upon conviction of any offense, except one involving a crime declared to be such by Congress, and in a case wherein "The People of the United States," and not the "Office of the Allied High Commissioner" was the complainant.

In *Duncan* v. *Kahanamoku, supra,* the late Mr. Justice Murphy, in a concurring opinion, said:

> "There is a very necessary part in our national life for the military; it has defended this country well in its darkest hours of trial. But militarism is not our way of life. It is to be used only in the most extreme circumstances. Moreover, we must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties" (p. 335).
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> "Constitutional rights are rooted deeper than the wishes and desires of the military" (p. 332).

Respectfully submitted,

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